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Introduction

The World Trade Organization (WTO) dispute resolution system is widely used and is a litigation-oriented process. It is at the core of global trade relations today. Both the United States and China have been aggressive users of the system. Each country has shown a willingness to address contentious issues, which has been to the benefit of both countries. As newer trade issues arise, this process will be indispensable in keeping US-China trade relations on a stable course.

My approach is to examine litigation data provided by the WTO and the United States Trade Representative (USTR) concerning the WTO dispute resolution system’s inception, the activity of the Bush and Obama administrations, and China’s record in the WTO. A series of charts with short explanatory passages helps illustrate this story.

This is not a jurisprudential study but one assessing empirical litigation data in order to disclose implications for American trade policy and the international trade system as they relate to China’s role in the global trading system.1

The conclusions are straightforward. The dispute resolution system is widely used by many developed and developing countries. The US has been the most active in the WTO’s dispute resolution system. The focus of the US has increasingly been on China, and Chinese litigation has been primarily focused on the US. Further, the pace of WTO litigation among all countries has picked up.

This review of US-China litigation is of the competitions that reflect trade flows and frictions, which are addressed successfully in a rules-based system rather than as a narrative of a deadly, winner-take-all conflict. Such legal conflict and its resolution is the way that the system was intended to work by its architects, principally the US.

My general conclusion is that, whereas the US and China are competitors, they have channeled their major trade disputes into an international diplomatic and adjudicatory mechanism that demonstrates cooperation and management. This approach is beneficial to both parties politically and in US-China trade relations and global governance.

Background

1 A new study released by the WTO and written by Professor Craig VanGrasstek presents, in part, a statistical assessment of WTO litigation relying upon data compiled by the WTO. Chapter 7—”Dispute Settlement” in C. VanGrasstek, “The Future and History of the WTO.” (2013).
The World Trade Organization (WTO) negotiates and adjudicates global trade rules. The dispute resolution system is at the heart of the WTO today; it is the judicial system of the WTO and of the global trading system.

The WTO and its dispute resolution system are the successor to the older, much weaker GATT system and came into existence in 1995. For the first time in history, there is now a multilateral system that resolves trade disputes with binding decisions enforceable by sanctions. There is nothing else like it in the international economic arena today.

The basis of the dispute resolution system is the WTO’s “Dispute Settlement Understanding” (DSU), one of the multilateral agreements that came to force in 1995. It establishes compulsory jurisdiction, binding decisions, and trade sanctions to enforce those decisions. The dispute resolution system applies all the rules found in the whole range of WTO trade agreements relating to agriculture, intellectual property, subsidies, services, investment measures, and merchandise trade, among others.

The United States has filed various actions against China concerning what it considers improper export subsidies and failure to enforce intellectual property rights. On the other hand, China has filed actions against the United States for their imposition of antidumping duties and safeguard tariffs. A large number of trade cases before the WTO involve “trade remedy legislation” authorizing dumping, subsidies, and safeguard measures. The dispute resolution system is widely used by many states, but most WTO litigation involves that between the United States and the European Union (EU). However, the most politicized and high-profile litigation involves the United States and China.

The actual dispute resolution process combines traditional negotiations and litigation and is relatively simple and quick. From start to finish, this entire process generally takes 12 to 15 months. States file a request for consultation that involves confidential diplomatic negotiations between the parties. If consultation does not result in a settlement, the complaining party may request the establishment of a panel to hear the case. This is where the litigation takes place. However, the majority of cases requesting consultation are resolved without ever going through the full litigation process.

Panel members are trade experts selected by the WTO and then chosen by the parties. The cases are decided by the panelists, not juries—a seeming adaptation of the civil-law approach to litigation. While precedent, a common-law notion, is not specifically provided for in the Dispute Resolution Understanding, it is in fact often utilized in panel and Appellate Body decisions. For a very long time, these proceedings were closed and did not allow amicus briefs, but this has now changed somewhat.

Parties may appeal the decision of the panel to the Appellate Body, which is composed of members selected by the WTO. Determinations by both the panel and Appellate Body are required to be adopted by the Dispute Settlement Body, essentially the entire membership of the WTO. In reality this adoption has proven to be automatic. When a decision is finalized, the losing party is required to bring its offending measure into compliance with the decision (technically, a recommendation), which allows it to formulate the specifics of the losing party's compliance to remove the offending restriction.
If there is a failure to comply after a reasonable time, the complaining party may request authorization to impose sanctions on the losing state. Most often, these sanctions are tariff surcharges on imports from the responding state until the offending measure is removed. Requests for sanctions have been very rare, and even when authorized, they have not always been imposed. Generally, states are no longer allowed to unilaterally impose trade sanctions on others unless authorized by the WTO. By-and-large, only multilateral trade sanctions as authorized by the WTO are lawful under global trade law today.

The WTO Dispute Resolution System

At the outset of any discussion of WTO litigation, it is important to note that only approximately 1/3 of cases filed go through the entire WTO litigation system (It is a bit higher for cases involving the US). The first stage in the litigation process is to file a request for consultation. This stage involves confidential diplomatic negotiations. Often, cases are dropped in this stage, even when there may not have been an agreement to remove contested restrictions. Only after negotiations are unsuccessful can the parties request for a panel to be formed. The chart below covers January 1, 1995, through September 30, 2013. Of the 467 cases filed (request for consultations), only 148 have led to litigation (some are still pending). Sanctions were authorized in only 9 cases and sanctions were not actually implemented in all of them.

Chart 1. WTO Cases (Merits) Filed and Litigated from January 1, 1995–September 30, 2013.

Data Source: 2013 Annual Report of the DSB (Nov. 1, 2013)—”Overview of State of Play of WTO Cases” by the Secretariat is amended to the DSB Report WT/DSB/61/Add.1

The WTO dispute resolution system has been widely utilized by both developed and developing countries. Developing countries have filed over 1/3 of the requests for consultation.
For example, in 2012 Latin American countries alone filed 9 of the 27 requests for consultation.\textsuperscript{2} A 2013 WTO report concluded that “developing countries participated strongly in the dispute settlement system, both as complainants and respondents.”\textsuperscript{3} A recent study sponsored by the WTO of litigation data observes, “The first conclusion that one can draw from the data is that these distinctions between common, code law and pluralism are not significant for explaining different members’ level of litigiousness.”\textsuperscript{4}

US in the Dispute Resolution System

The US has been extremely active in the WTO litigation process. In fact, it has been the most active member. The US was brought before the WTO approximately 50\% more often than it brought cases. As the complainant, it brought a total of 99 cases. (This includes 9 compliance cases that were brought after the original case in order to secure compliance.) It was a respondent in a total of 140 cases. (This includes 16 compliance cases.) Of the 90 original cases it brought, 42 were fully litigated, resulting in 38 wins and just 4 losses. Of the 124 original cases brought against the US, it lost 50 but won a relatively high number of 17. In total, the US won just about as many cases as it lost (55 wins and 54 losses). A significantly higher number of cases went on to the full litigation process when the US was the respondent rather than when it was the complainant.

\textsuperscript{3} Id.
Over 40 cases did not make it out of the consultation stage. The USTR considered that 29 of them were resolved to the US’s satisfaction without completing litigation. The remainders were either dropped or inactive. “Snapshot of US Cases in the WTO.” (August 8, 2012). http://www.ustr.gov/sites/default/files/Snapshot%20Aug8.fin_.pdf
Chart 3. US as Respondent 1995–2012 (Merits)

Chart 4. US as Complainant and Respondent 1995–2012 in Total Cases
(Merits and Compliance)
Bush and Obama Administrations in the Dispute Resolution System

During the last presidential election, President Obama made much of his record for bringing legal actions against China and his aggressive use of the WTO legal process as a means of enforcing global trade obligations.

President Clinton actually brought a far larger number of cases before the WTO than did either President Bush or President Obama. Over eight years, President Clinton brought 69 cases, whereas President Bush brought 24 cases. In five years, President Obama brought only 13 cases. China was not a member of the WTO during President Clinton’s administration. This decrease in number of cases brought subsequent to the Clinton years may well indicate that the United States is more satisfied today that trade obligations are being observed than in the earlier years of the WTO, as well as the possibility that the WTO has clarified many complex trade obligations.

Comparing President Bush’s eight years and President Obama’s first four years or so, it is clear that President Obama has been more aggressive than his predecessor. President Obama brought 8 cases in four years compared to President Bush’s 7 cases in eight years. President Obama was much more focused on China in WTO litigation than was President Bush.
Bush brought a total of 24 cases; only 7 were directed against China. President Obama has brought 13 cases; 8 of them were against China. Therefore, it is fair to conclude that President Obama has been very aggressive against China. I would add that he was hyper-focused on this litigation.


Obama (January 2009–February 2014) ................. 8
China in the Dispute Resolution System

Almost immediately after its accession to the WTO in 2001, China became extremely knowledgeable in the WTO litigation process. In fact, China filed a case against the US before the US filed its onslaught of cases against China. China and the US have been major adversaries in the WTO’s litigation process, but China’s litigation has also involved other member states, such as the EU and Japan.

China has brought 14 actions against WTO members. It brought 9 cases against the US and 3 against the EU. However, China has been brought before the WTO more often than it has brought cases. China has been a respondent in 31 cases. The US brought 15 cases, whereas the EU brought 7. Further, 9 other cases have been filed, including those by Mexico and Japan. It should be noted that most of the cases brought against China were parallel actions to those filed by the US, although some were totally independent. Parallel actions are those that by-and-large

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mimic US arguments and legal issues. They merely involve different countries with their own fact-specific situations.

Of the 14 cases brought by China and concerning the US, 5 have been decided. The others are pending. China won 3, and the US prevailed in 2. These cases almost exclusively involved dumping and safeguard issues. In the 15 actions brought by the US against China, the US won all of the 7 decided cases. The other cases are pending or inactive. The cases won by the US involved, among other issues, intellectual property rights, dumping, and export controls. Therefore, in the 12 decided cases involving the US and China, the US won a total of 9 cases, whereas China won 3.

One of the highest profile trade issues, the valuation of the yuan, has not been submitted by the Obama administration to the WTO, despite significant demands from Congress and the public to do so. In my opinion, both the Bush and the Obama administrations understand that the WTO agreements were never intended to cover this type of currency-exchange issue. Similarly, no cases have been filed by China against the US concerning US restrictions on Chinese direct investment in the US when based upon claims of national security. The WTO provides architecture for global trade relations. The WTO’s central mandate is trade, not finance or investment.


China as Complainant
- China Against the US: 9
- China Against the EU: 3

China as Respondent
- US Against China: 15
- EU Against China: 7
- Others: 9
Chart 10. Wins in US-China Litigation

Wins as Complainant in U.S. - China Litigation
(December 2001–Feb. 2014)

<table>
<thead>
<tr>
<th></th>
<th>China</th>
<th>U.S.</th>
<th>Total</th>
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<tr>
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<tr>
<td>U.S. as Complainant</td>
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</table>

Total wins in US-China litigation from December 2001 to February 2014.
**Observations**

The Obama administration has not filed a new case against China since the 2012 election. In contrast, both the EU and Japan have filed actions against China. Moreover, China has filed recent actions against the EU and the United States.

Some observers argue that constant litigation is corrosive to the international trading system. For example, one commentator laments the fact that “more and more of the work of trade relations has shifted away from negotiations and towards litigation and arbitration.” Another argues, “The Obama administration has put enforcement of trade agreements at the heart of its agenda.”

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7 DS 460. EU v China (China A/D Duties on EU Steel Imports) (June 13, 2013). The EU and China have settled the “solar case” after mutually threatening WTO filings. This has raised issues concerning the common or external trade powers of the EU. “Frustrated and Outflanked.” Financial Times (July 31, 2013).


11 Beattie, “How Lawsuits Are Coming to Dictate the Terms of Trade.” Financial Times (February 20, 2007).
of the approach toward China ... But winning in the courtroom is often only the start of the battle.”

However, others have taken more nuanced approaches. In fact, an earlier skeptic recently stated, “In fact, the situation is more complex, and less worrying, than it might appear ... (A) heartening amount of the litigation has actually been aimed at preventing arbitrary trade restrictions in the future ... Much is aimed at obtaining rulings preventing others using ‘trade defense’ instruments, such as antidumping and countervailing duties, as a politicized tool of arbitrary retaliation.”

I view US-China litigation in the WTO as validating the strength and critical importance of the WTO and its dispute resolution system. China is now the second-largest economy in the world. It is expected that disputes increase with trade flows. The strength of the international system is not in the absence of disputes, but in the way that they are resolved. The failure of the WTO to conclude a more robust agreement at the conclusion of the 2013 Bali Ministerial and the general failure of the Doha round of negotiations to formulate newer trade rules only highlight the growth and immense historical significance of the dispute resolution system.

An examination of the cases involving China shows that trade disputes that arise between it and the United States are submitted to the WTO and are resolved, either by diplomatic negotiations in the consultation stage or in the litigation phase. No enforcement actions by either country asking for sanctions have been filed under Article 22 of the Dispute Settlement Understanding. The primary focus of China’s litigation in the WTO has been the US. Nevertheless, China is paying an increasing amount of attention to the EU and other countries. China’s use of the dispute resolution system and observance of the WTO’s recommendations are beneficial developments in promoting a rules-based global trading system. This history of China’s participation in the WTO’s dispute resolution system shows a growing acceptance of global trade rules by China. This represents an understanding that, to benefit from the global trading system, China needs to follow the rules of the road.

CHINA’S WTO LITIGATION (2001–2014)

[14 as Complainant; 31 as Respondent]

As of February 10, 2014

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<tr>
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<th>Status</th>
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<td>US</td>
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<td>379</td>
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[Non-US Respondents]

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CHINA AS RESPONDENT

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**US Export Restrictions on Rare Earth Metals**
Consult. filed 2012 431 ///

**US Dumping and Subsidies on US Auto Imports**
Consult. filed 2012 440 ///

**US Subsidies on Autos and Auto Parts**
Consult. filed 2012 450 ///

* Parallel Cases with other Complainants

**[Non-US Complainants]**

--- Often Parallel Cases with the US ---

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<td>Export Restrictions on Rare Earth Metals*</td>
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**Conclusion**

An analysis of all WTO cases filed in 2012 in *The WTO Annual Report for 2013* shows that the US filed 5 cases (requests for consultation), whereas China and Japan filed 3 each. The main targets of all litigation were China (7), the US (6), and the EU (3). The report concluded, “In sum, WTO dispute settlement activity increased markedly in 2012. It is clear that WTO members, both developed and developing, continue to have a high degree of confidence in the

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16 Id.
WTO dispute-settlement mechanism to resolve their disputes in a fair and efficient manner. It is also evident that members are confident that the system is capable of adjudicating a wide variety of disputes covering significant questions and complex issues.\textsuperscript{17}

It is worthwhile to note the recent observation by Pascal Lamy, then Director General of the WTO.\textsuperscript{18} He argued that “trade frictions are a statistical proportion of trade volumes,” whereas “trade disputes are a statistical proportion of trade frictions.” He brushed off concerns about the increasing number of trade disputes between the US and China. He contended that the WTO mechanism takes the heat out of disputes by utilizing a process that is rules-based, predictable, and respected.\textsuperscript{19}

Lamy warned in a subsequent presentation that geopolitics is back at the trade table.\textsuperscript{20} He noted that the value chains are multilateralizing and that trade governance needs to meet this challenge. Lamy argued that China would benefit from taking a more active role in global governance in trade and related issues: “China’s economic take-off benefited from a stable external environment. Its sustainability depends on a well-functioning global trading system. As a key stakeholder, China should take a more proactive role in international economic governance ....”\textsuperscript{21}

While inheriting a complex trade situation,\textsuperscript{22} the Obama administration has clearly put trade at the heart of its second-term agenda.\textsuperscript{23} This policy includes negotiating the Trans-Pacific Partnership (TPP) and the Trans-Atlantic Trade and Investment Partnership (TTIP). The future of these negotiations is dependent on Congress’s authorization of “fast track” authority for President Obama.\textsuperscript{24} Nevertheless, the core of the administration’s trade policy is its insistence on greater trade enforcement by US trade agencies and the WTO, particularly with China. What is the point of negotiating rules if they will not be enforced? The Secretary of State John Kerry succinctly stated, “Foreign policy is economic policy.”\textsuperscript{25}

The 2013 Report to Congress on China’s WTO Compliance by the United States Trade Representative (USTR) stated clearly the central position of WTO litigation in US-China trade relations: “When trade frictions have arisen, the United States has preferred to pursue dialogue with China to resolve them. However, when dialogue with China has not led to the resolution of key trade issues, the United States has not hesitated to invoke the WTO’s dispute settlement

\textsuperscript{17} Id. 89.
\textsuperscript{19} Id.
\textsuperscript{20} Lamy, “Putting Geopolitics Back at the Trade Table.” \textit{WTO News} (January 29, 2013).
\textsuperscript{22} Schneider, “Inheriting a Complex Trade Agenda.” \textit{Washington Post} (June 22, 2013).
\textsuperscript{24} Malawer, “President Needs Fast-Track Authority.” \textit{Richmond Times-Dispatch} (February 17, 2014).
mechanism.” While the "US-China Strategic and Economic Dialogue" (S&ED) was established by President Obama in order to discuss diplomatically a broad range of issues, the report continues that “the United States has placed a strong emphasis on the need for China to adhere to WTO rules, holding China fully accountable as a mature participant in, and a major beneficiary of, the WTO’s global trading system ... Unquestionably, China’s incomplete adoption of the rule of law has exacerbated this situation.” Indeed, the report outlines a large number of issues that might very well eventually find their way to the dispute resolution system. The report outlines a policy that is continuing under the USTR Michael Froman, a former member of the National Security Council, and under the new United States Ambassador to China Max Baucus, former chairman of the Senate Finance Committee.

At least in terms of adjudicating trade disputes and governing existing and emerging trade issues, the WTO has proven itself well beyond the grandest dreams of the early architects of the dispute resolution system. The new Director-General of the WTO Roberto Azevêdo appropriately noted in one of his first speeches that, “The dispute settlement mechanism is under heavy demand. This is yet another sign of the importance of the WTO system in uncertain times.” A recent book sponsored by the WTO makes the point that international economic law and global trade rules enhance a country’s ability to participate in the global economy and helps strengthen the domestic rule of law.

Newer trade issues are emerging swiftly in this rapidly globalizing trading system. A recent WTO panel on “Defining the Future Trade Issues” released its report in 2013. It enumerated nine issues, including competition policy, international investment, currencies, labor, climate change, corruption, and coherence of international economic rules. Some of these issues have been around for a while, and some have become much more pressing.

To this list, I would add the issue of cyber-espionage for commercial and economic gain as a new front in global trade wars. The Obama administration has suggested that trade tools

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27 Id.
30 M. Jansen, M Jallab and M Smeets, CONNECTING TO GLOBAL MARKETS 4 (WTO 2014).
31 Korea filed a new action against the US in the WTO over its antidumping and subsidies measures concerning imports from Korea that utilize “zeroing.” This methodology has long been contested in many actions against the US in the WTO. The US has almost always been found to have violated the WTO’s rules for imposition of antidumping duties based upon zeroing. “Korea Files Dispute (Washing Machines).” WTO News (August 29, 2013).
34 “The Administration will utilize trade policy tools to increase international enforcement against secret theft to minimize unfair competition against US companies.” “Administration Strategy on Mitigating the Theft of US Trade
should be used to combat cyber-espionage for commercial gain, which would possibly involve WTO litigation. Of course, recent disclosures that the National Security Agency (NSA) have discussed with the Australian intelligence agency Australia’s snooping on Indonesia’s communications with its American legal counsel, involved with its WTO actions against the United States, complicates this policy proposal by the Obama administration.

In addition to this newer issue of commercial cyber-espionage, I would add two additional issues: foreign direct investment and taxation. Growing foreign investment by Chinese companies has raised questions of national security. Tax avoidance has become the scourge of many countries and international organizations who have targeted it as economic development and national budgets come under increasing pressure because of global economic problems. These areas could certainly benefit from greater multilateral-based solutions through the WTO, perhaps leading to trade agreements relating to direct investment (TRDI) and to international taxation (TRIT). These areas may even be subject to future litigation in the WTO under existing rules.

Challenges remain and are expected to continue. Those relating to the most important bilateral trade relations in the world today between the US and China are set to grow as trade develops even more. Global transactions in a multijurisdictional world need a mechanism to resolve a wide range of business, trade, and economic issues. In an increasingly interconnected trading system, and a less hierarchical political system, cooperation through diplomacy and adjudication is preferable to outright power-politics confrontation.

Each country has shown that it is willing to work with the other to apply the rules of global trade, which will need to continue as new disputes arise and even newer trade issues evolve. It is in the national interest of China to conform to the global rules and to be proactive in developing them. This approach should be at the core of Chinese foreign-policy decision-making in the 21st century. It is to the advantage of both the US and China that they look toward the future together to build a peaceful, international rules-based system.

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