

United States-China WTO Litigation (2001–2010)

by Stuart S. Malawer



Stuart S. Malawer (right) is distinguished service professor of law and international trade in the School of Public Policy at George Mason University. He is the author of the casebooks *U.S. National Security Law* (2009) and *WTO Law, Litigation & Policy* (2008). He holds a law degree from Cornell University and a doctorate in international relations from the University of Pennsylvania. He was a delegate on Governor Mark R. Warner's China trade mission and was appointed by Governor Timothy M. Kaine to the board of directors of the Virginia Economic Development Partnership. He is a former chair of the VSB International Practice Section. Warner is on the left.

In 1995, a dispute resolution system was established as part of the new World Trade Organization (WTO). “The dispute resolution system, launched without much fanfare or recognition, has become the most effective system ever to adjudicate and implement global trade rules.”¹ From December 11, 2001, when China acceded to the WTO, it has been an active litigant in the WTO. From the very outset of China’s accession, both the United States and China have taken offensive actions against each other in the dispute resolution process.

For example, in September 2010 the Obama administration filed two cases against China in the WTO. These cases involve China’s restrictions on imports of steel from the United States and on electronic payments by American credit card firms in China. The Obama administration is considering filing additional cases concerning China’s restrictions on the export of rare earth minerals and China’s clean-energy subsidies. Last year, China filed two cases against the United States in the WTO regarding U.S. agricultural restrictions on Chinese exports to the United States and U.S. antidumping duties on tires imported into the United States. While the continuing China–U.S. conflict over the valuation of the yuan highlights a significant issue in bilateral trade relations, it has not yet been the subject of a U.S. complaint against China in the WTO. However, many in Congress and in the private sector have been lobbying for just such a case.

An examination of cases filed by China and the United States against each other illustrates the role of WTO litigation in the context of bilateral U.S.–China trade relations, highlights the type of issues at stake, and suggests significant implications for both American trade policy in particular and foreign policy in general.

China has been a complainant in seven cases and a respondent in twenty in the dispute resolu-

tion system of the WTO; most of the cases brought by China have been against the United States. Likewise, most of the actions against China have been taken by the United States. A careful analysis of the cases indicates an even starker relationship between these two countries. Since many cases were filed by the United States and then others joined in, filing parallel actions, the number of total cases is inflated. In fact, all of the cases brought by China have been against the United States, with only two against the European Union. Similarly, all of the cases filed against China have been filed by the United States, with various other nations filing parallel actions. The EU is the only party that has filed an independent case against China. China has won two cases, and the United States has won four. Three cases have been resolved diplomatically after consultations were requested but prior to a panel decision. The remaining cases are pending.

This leads me to conclude that the bilateral trade relations between China and the United States are indeed being fought out in the WTO. This has significant implications for bilateral trade relations between the two countries, of course: The role of WTO litigation in U.S. trade policy is growing, from the George W. Bush administration to the Obama administration. WTO litigation is becoming a significant aspect of global trade relations, at the expense of traditional trade negotiations. In my opinion, given the failure of trade negotiations, the implications are generally favorable.

Overview of Cases

United States as Complainant

In 2004, the Bush administration filed its first case against China; it concerned China’s value added tax (VAT) on integrated circuits.² The case was settled by a mutually agreed-upon solution without resorting to the establishment of a panel. China amended or revoked the VAT refunds. In 2006, the Bush administration filed a complaint that contested China’s measures affecting imports of automobile parts,³ arguing that classifying automobile parts as completed automobiles and then taxing them at the higher rate was improper. The case was filed jointly with the

European Communities⁴ and Canada.⁵ In 2008, the WTO panel and its Appellate Body ruled in favor of the United States. China subsequently implemented the recommendation to stop treating imported automobile parts as though they were completed automobiles. It should be noted that this was essentially one case decided by a single panel, but since there were three separate filings, the data lists it as three cases.

The Bush administration then filed a case against China contesting tax refunds by the government to enterprises in China.⁶ Various other countries joined the consultations but then elected to go forward only as third parties. Subsequently, China and the United States reached a diplomatic agreement in the form of a memorandum of understanding. A similar dispute was filed by Mexico was likewise settled.⁷ In April 2007, the Bush administration filed twin cases against China over China's lack of enforcement of intellectual property rights⁸ and its restrictions on importing electronic entertainment products.⁹ In the former case, the United States argued that the threshold for criminal prosecutions of intellectual property violations was too high. In the latter, the United States contended that restrictions on foreign firms involving the import and distribution of electronic entertainment products were not permissible as an exception to the protection of public morals. A panel generally ruled in favor of the U. S. claims of the lack of enforcement of intellectual property rights. China did not appeal and agreed to comply with the panel's recommendations. The Appellate Body ruled in favor of the United States regarding improper restrictions on the import and distribution of electronic entertainment products. China has agreed to remove these restrictions.

In 2008, during its last year in office, the Bush administration filed a complaint concerning China's restrictions on financial information services that required the use of government-designated distributors.¹⁰ In December of that year, the two countries settled the dispute during their consultations. The European Communities and Canada filed similar complaints, which were also settled.¹¹ Immediately after this case was concluded, the Bush administration filed another action against China, attacking that country's Top Brand Program and Chinese Famous Export Brand Program as providing improper incentives.¹² Mexico and Guatemala filed similar cases.¹³ No further action has been taken as of this writing.

In June 2009, within five months of coming into office, the Obama administration filed its first case against China to contest measures relating to the export of various raw materials; the complaint that the measures involved improper export restraints.¹⁴ The European Community and Mexico filed similar actions.¹⁵ No further action has yet been taken. Most recently, in September 2010, the Obama administration filed twin cases against China concerning its restrictions on credit card and electronic payments by U.S. firms in China¹⁶ and China's antidumping and countervailing duties on the import of steel from the United States.¹⁷ Consultations have been requested. Also in 2010, the European Communities filed a new action against China concerning its antidumping duties on steel fasteners.¹⁸

China as Complainant

China has filed seven cases as a complainant. Five of the cases were against the United States and two were against the European Communities. It is instructive to note that the first action involving the two countries was filed by China against the United States.¹⁹ It was filed in March 2002, just a few months after China's accession to the WTO. This was a separate but parallel action to cases filed by the European Communities, Japan, and Korea. China argued that the safeguard measures imposed by the Bush administration on the import of steel were not consistent with the WTO obligations of the United States. A single panel was established. It issued a report against the United States. The Appellate Body's report in November 2003 upheld the panel findings. Almost immediately afterward, the Bush administration announced that the president had issued a proclamation terminating all safeguard measures that were subject to the dispute.

WTO litigation is becoming a significant aspect of global trade relations, at the expense of traditional trade negotiations.

China did not file another case until 2007. In all, China has filed four additional cases since 2003, two of which are still pending in the consultation stage. In 2007, China filed a complaint alleging improper preliminary antidumping and countervailing duty determinations on coated

paper exports to the United States.²⁰ This was after the United States had already filed three cases. A year later, China filed a similar case against the United States concerning a final determination of such duties on certain exports (tires and steel) from China. In late 2010 a panel ruled in favor of the United States largely upholding its

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methodology and treatment of state-owned enterprises.²¹ In 2009 China filed a complaint against U.S. law on the import of poultry products from China, pursuant to new U.S. legislation restricting the authority of the U.S. Department of Agriculture in terms of processing such imports. This was decided in China's favor in September 2010.²² In response to the Obama administration's imposition of safeguard measures on the import of Chinese tires under Section 421 of the Trade Act of 1974, implementing China's accession obligations, China filed an action in 2009.²³ The panel report is still pending.

The only other cases that China has initiated are two against the European Communities in 2009 and 2010. The first case concerns the antidumping duties imposed by the European Communities on iron and steel fasteners from China,²⁴ and the second, similar duties imposed on shoe imports from China.²⁵ A panel gave China its biggest win in the WTO when it ruled in its behalf concerning fasteners in early December 2010.

Observations

The complaints of the United States against China cover a wide variety of restrictions involving taxation, customs classification, intellectual property rights, services, protection of domestic production, and export restrictions, along with antidumping and countervailing determinations. To some extent, China's complaints against the United States mirror some of those same concerns: safeguard measures—both antidumping and countervailing duties—and agricultural restrictions that protect domestic industry. The elephant in the room for the United States has not involved WTO actions; rather, it has had to do with the valuation of Chinese currency, which

the United States administration and many in Congress, the public, and the business community consider to be manipulated and undervalued. Neither the Bush nor the Obama administrations initiated WTO litigation against China over the currency issue and neither has declared China a currency manipulator. Other countries manage their currencies and, indeed, devalue them to promote exports. Japan and Korea have done so recently and the United States, of course, did this in the 1980s with the Plaza Accord. The United States is currently undertaking greater quantitative easing as a monetary policy that is resulting in devaluing the dollar.

As a matter of policy, the Obama administration seems to have seamlessly adopted the Bush administration's offensive policy concerning WTO litigation. It filed its first action against China within six months of coming into office. It uses litigation to contest trade restrictions the United States has not been able to remove through diplomatic negotiations. It determines the use of litigation in the context of both domestic politics and larger foreign policy considerations. The United States actively and aggressively uses the litigation process as a means of confronting China on a range of trade restrictions, although not all such issues are challenged. This clearly gives Congress and the American public the appearance of being tough on China without confronting the currency issue. Often, litigation has occurred before Congress takes up tough proposals regarding China—proposals that the administration does not favor. The decision to legally contest restrictions is balanced against other foreign policy considerations relating to non-trade issues that require China's cooperation and support.

Likewise, China actively and aggressively uses the litigation process for both domestic and foreign policy purposes. It was the first of the two countries (the United States and China) to bring suit against the other. All of China's WTO litigation as a complaining party is against the United States, except for two cases against the European Communities. It uses the litigation process to contest U.S. trade restrictions and, often, as a response to U.S. actions both in and outside the WTO. China brings actions as a means of responding to domestic pressures, as do most states. Sometimes, this may be for the good. It allows the Beijing government to rationalize

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U.S.- CHINA WTO LITIGATION (2001–2010)

Stuart S. Malawer (Data as of December 7, 2010)

CHINA as COMPLAINANT (against U.S.) — U.S. as Respondent.

		Subject Matter of Case	Filing Date	DS Case #	Status	Winning Party
1		U.S. Safeguard Measures on Steel Imports from China	2002	252	AB (2003) for China	China
2		Dumping & Subsidies — Free Sheet Paper Imports from China	2007	368	Pending since 2007	
3		Dumping & Subsidies — Certain Products Imports from China	2008	379	Panel for U.S.	U.S.
3		§ 727 (2009 Act) Denial of Poultry Imports (USDA) from China	2009	392	Panel (2010) for China	China
5		§ 421 (1974 Trade Act) Safeguard — Tire Imports from China	2009	399	Panel pending since 2009	

[China Complaints against Other Members.]

6	EC	Dumping — Iron & Steel Fasteners from China	2009	397	Panel (2010) for China	China
7	EC	Dumping — Footwear Imports from China	2010	405	Pending since 2010	

U.S. as COMPLAINANT (against China) — China as Respondent.

1		VAT on Integrated Circuits	2004	309	Mutually Agreed Solution	Resolved
2		Measures on Import of Auto Parts	2006	340	AB (2008) for U.S.	U.S.
3		Taxes & Refunds to China Firms	2007	358	Panel — MOU (2007)	Resolved
4		Protection of IPR.	2007	362	Panel (2009) for U.S. (no AB)	U.S.
5		Distribution Audiovisual Services Entertainment Products	2007	363	AB (2009) for U.S.	U.S.
6		Financial Information Services & Information Suppliers	2008	373	Consultation — MOU (2008)	Resolved
7		Grants & Loans (Subsidies)	2008	387	Consultation since 2008	
8		Raw Material Export Restraints	2009	394	Panel since 2009	
9		Restrictions on Credit Card Electronic Payment Services	2010	413	Consultation	
10		China's A/D & CVD on U.S. Steel	2010	414	Consultation	

[Complaints by Other Members with the U.S. (Parallel Actions)]

11	EC	Measures on Import of Auto Parts	2006	339	AB (2008) for EC	EC
12	Canada	Measures on Import of Auto Parts	2006	342	AB (2008) for Canada	Canada
13	Mexico	Taxes & Refunds to China Firms	2007	359	Panel — MOU(2008)	Resolved
14	EC	Financial Information Services & Information Suppliers	2008	372	Consultation — MOU(2008)	Resolved
15	Canada	Financial Information Services & Information Suppliers	2008	378	Consultation — MOU(2008)	Resolved
16	Mexico	Grants & Loans (Subsidies)	2008	388	Consultation since 2008	
17	Guatemala	Grants & Loans (Subsidies)	2009	390	Consultation since 2008	
18	EC	Raw Material Export Restraints	2009	395	Panel since 2009	
19	Mexico	Raw Material Export Restraints	2009	398	Panel since 2009	

[Complaint by Other Members]

20	EC	Iron & Steel Fasteners from EU (Dumping)	2010	407	Consultations since 2010	
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unpopular actions that need to be taken domestically in order to comply with WTO disciplines.

China has complied with the decisions of the WTO. It has become more active in filing cases against the United States and the European Union. China views WTO litigation as part of

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diplomacy, rejecting its traditional opposition to litigation. China is playing by the rules of the international trading system, indicating a growing support of that system.

Is China’s currency policy an export subsidy that violates its WTO obligations? This legal question has not been presented to the dispute resolution system. This is probably because the issue is not really within the scope of the WTO disciplines, and both the Bush and Obama administrations have wanted to avoid escalating trade disputes with China, despite the fact there

is significant pressure in Congress to enact legislation declaring China’s currency policy an export subsidy. Seeking a WTO trade remedy for global monetary chaos is nonsensical and counterproductive. It does not help the rules-based trading system; nor fix the lack of regulation in global finance.

This trend toward using more litigation is good for the WTO and global trade relations. The settlement of concrete trade disputes by a regularized adjudicatory system is a great advance in global governance and in the creation of a rules-based trading system. The benefit becomes increasingly evident as bilateral trade negotiations repeatedly fail to reach accommodations, and the multilateral negotiation process of rule-making becomes bogged down in the Doha negotiations. In regard to the rules already accepted by the global trading community, these rules are clarified by litigation and applied to an ever-developing global trading system that confronts historical challenges and involves a host of rapidly changing areas, such as finance, services, technology, the environment, and economic development.

The WTO governs transnational transactions that affect core domestic concerns. The more the dispute resolution system resolves conflicts over these transactions and the deeper economic inte-

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U.S.-CHINA TRADE LITIGATION — IMPORTANT WEBSITES

Official China Web Sites for Foreign Affairs & Foreign Commerce

Foreign Ministry of Commerce	http://english.mofcom.gov.cn/
Ministry of Foreign Affairs	http://www.fmprc.gov.cn/eng/
Mission to the World Trade Organization	http://wto2.mofcom.gov.cn/aboutus/aboutus.html
Embassy to the U.S. (Commercial Counsellor)	http://us2.mofcom.gov.cn/index.shtml

Official U.S. Websites for International Trade

Office of the United States Trade Representative	http://www.ustr.gov/
USTR — Enforcement	http://www.ustr.gov/trade-topics/enforcement
USTR — China & U.S Trade	http://www.ustr.gov/countries-regions/china
USTR — WTO & Multilateral Affairs	http://www.ustr.gov/trade-agreements/wto-multilateral-affairs
U.S. International Trade Commission	http://www.usitc.gov/
U.S. Dept. of Commerce (International Trade Administration)	http://trade.gov/

Official WTO Websites (Dispute Resolution)

World Trade Organization	http://www.wto.org/
WTO — Dispute Settlement	http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm
WTO — Understanding the WTO — Disputes	http://www.wto.org/english/thewto_e/whatis_e/tif_e/disp1_e.htm
WTO — Appellate Body	http://www.wto.org/english/tratop_e/dispu_e/appellate_body_e.htm

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gration they involve, the better it is for all. The global trade landscape has changed immensely since the post-war era, through the demise of the Soviet Union and since the attacks of September 11, 2001. The recent global financial crisis and its currency wars further highlight these changes. Strategic rivalries in the future pose grave threats to U.S. national security. Managing the growing tensions over global trade is of the utmost importance.

With a greater global trade volume and a larger number of nations expanding their trade transactions, one would expect more commercial and policy disputes. With the rise of more trading powers and development of the multilateral system, it is preferable that trade disputes be settled through rules adopted by the global community and interpreted by an impartial system in concrete cases. While litigation is never a friendly act, it is not necessarily an unfriendly one. When litigation is resolved properly it establishes a strong basis to move forward in trade relations and negotiations.

It is incorrect to think that litigation decides only cases between the actual parties. While litigation is binding only on the actual parties, it has two broader effects. The first is that it applies and clarifies trade rules in concrete situations, often newer situations that did not exist at the time of negotiation of the rule. Second, litigation removes trade restrictions, which benefits all WTO members. Both of these effects are significant advances for a rules-based trading system and helps provide multilateral governance to an explosive area of international relations. Litigation removes competitive unilateralism.

It is better that trade disputes are resolved, rather than spinning out of control and affecting other foreign policy interests. U.S.–China trade relations are no exception. Such litigation is a means of sanitizing disputes to restrict their toxic overflow. Many disputes filed with the dispute resolution system are resolved prior to going through the full litigation process. As in domestic litigation, the threat of full litigation encourages settlement, and that is the preferred manner of settling disputes, which is good for the system and good for the United States. ♪

Endnotes:

1 Malawer, Stuart S., “Litigation and Consultation in the WTO – 10th Anniversary Review,” 54 VIRGINIA LAWYER 32 (June / July 2005).

The dispute resolution system of the World Trade Organization (WTO) is of central importance to the global trading system. Within the last ten years it has become critical to global trade relations. The largest and the smallest of nations participate in litigation before the WTO. Cases involve an extraordinary wide range of economic and trade issues with significant domestic and international political implications. Stuart Malawer, “Introduction,” WTO LAW, LITIGATION & POLICY (Wm S. Hein & Co. 2007).

2 Value Added Tax on Integrated Circuits, Dispute Settlement (DS) 309.

- 3 Measures on Import of Auto Parts (DS 340).
- 4 Measures on Imports of Auto Parts (DS 339).
- 5 Measures on Imports of Auto Parts (DS 342).
- 6 Taxes & Refunds to China Firms (DS 358).
- 7 Taxes & Refunds to China Firms (DS 359).
- 8 Protection of Intellectual Property Rights (DS 362).
- 9 Distribution of Audiovisual Services Entertainment Products (DS 363).
- 10 Financial Information Services and Information Suppliers (DS 373).
- 11 Financial Information Services and Information Suppliers (DS 372) and (DS378).
- 12 Grants and Loans (Subsidies) (DS 387).
- 13 Grants and Loans (Subsidies) (DS 388) and (DS 390).
- 14 Raw Material Export Restraints (DS 394).
- 15 Raw Material Export Restraints (DS 395) and (DS398).
- 16 Restrictions on Credit Card & Electronic Payment Services (DS 413).
- 17 China’s A/D and CVD on U.S. Steel (DS 414).
- 18 Iron & Steel Fasteners from EU (Dumping) (DS 407).
- 19 U.S. Safeguard Measures on Steel Imports from China (DS 252).
- 20 Dumping and Subsidies – Free Sheet Paper Imports from China (DS 368).
- 21 Dumping and Subsidies – Certain Product Imports from China (DS 379).
- 22 § 727 (2009 Act) Denial of Poultry Imports (USDA) from China (DS 392).
- 23 § 421 (1974 Trade Act) Safeguards – Tire Imports from China (DS 399).
- 24 Dumping – Iron and Steel Fasteners from China (DS 397).
- 25 Dumping – Footwear Imports from China (DS 405).