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**The Impact of the WTO Dispute
Settlement System on China:
Effectiveness, Challenges and
Broader Issues**

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The Impact of the WTO Dispute Settlement System on China: Effectiveness, Challenges and Broader Issues

Weihuan Zhou*

Abstract

To reflect on China's 20 years in the World Trade Organization (WTO), this chapter offers an overview and some critical analysis of China's implementation of the rulings of the WTO's dispute settlement system (DSS). It shows that China has maintained an impressive record of compliance, which is a clear proof of the effectiveness of the DSS. Specifically, the DSS has caused not only changes to specific policy instruments but also systematic adjustments of China's complex regulatory regime in an incremental manner. This chapter then examines three systemic challenges for the DSS – i.e. temporary breaches, repetitive breaches and post-compliance regulatory developments – while contending that these challenges are not specific to China but apply to all WTO Members. It ends by offering some observations on the growing debate over the broader issues relating to China's economic model and compliance with the spirit of WTO rules. While these issues remain highly controversial, a functional DSS is urgently needed to maintain its impact on China. Otherwise, countries that are keen to push China to further economic reforms will lose an important policy option (i.e. multilateral disciplines) while other approaches (i.e. unilateral measures) have proven less effective or even counter-productive in dealing with the rising global superpower.

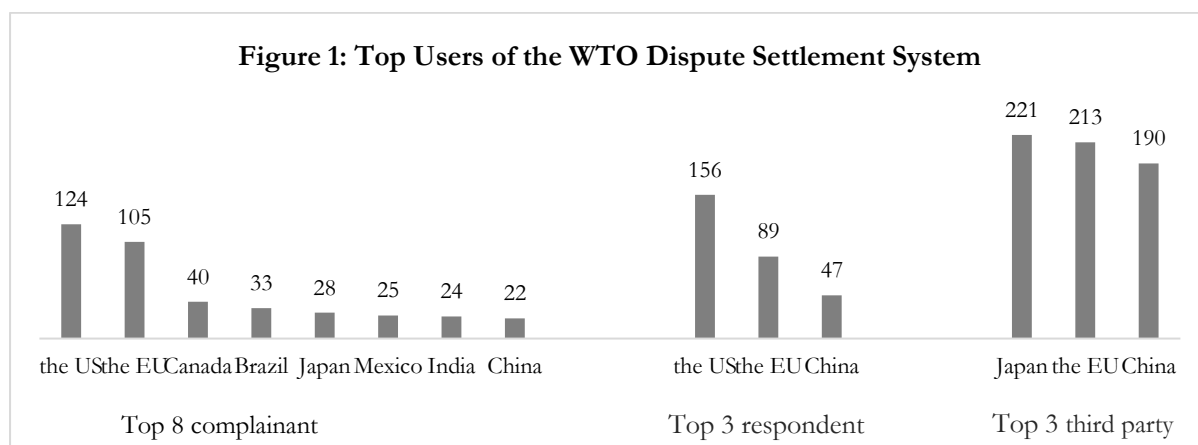
Keywords

WTO, China, Dispute settlement, Compliance, Market economy, Transparency.

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I. INTRODUCTION

Since China joined the World Trade Organization (WTO) in 2001, its role in the WTO’s dispute settlement system (DSS) has developed significantly over the past twenty years. As widely observed, this period has witnessed China becoming an increasingly experienced and influential player, i.e. from a ‘rule taker’ (2001-2005) to a ‘rule shaker’ (2006-2009) and then a ‘rule maker’ since 2010 (Gao 2011; Toohey 2011; Mercurio and Tyagi 2012). This observation is supported by the number of disputes in which China has been involved. By 1 October 2021, China had been a complainant in 22 cases, a respondent in 47 cases and a third party in 190 cases, making it one of the most active players in the DSS: see Figure 1. While many factors may be employed to explain China’s behaviour and evolving practices (Ji & Huang 2010), a major one has to do with its growing capacity and expertise in WTO law and dispute settlement (Shaffer & Gao 2018).



This chapter is not intended to examine all the disputes in which China has participated. Instead, it focuses on select disputes involving China as a respondent, with an aim to critically analyse the impact of the DSS on China’s economic reforms and policymaking. This analysis necessarily involves a consideration of the overall pattern of development in China’s strategies and behaviours in these disputes and more specifically, the factors behind China’s approaches to implementing unfavourable WTO rulings. Section II discusses the effectiveness of the DSS, arguing that the system has been largely effective in leading not only to changes to a range of WTO-illegal policy instruments but also to gradual and systematic adjustments of certain complex regulatory regime in China. Despite China’s good record of implementing WTO rulings, its approaches have revealed three challenges for the DSS in relation to temporary breaches, repetitive breaches and post-compliance regulatory developments, which are discussed in Section III. These challenges, however, concern systemic constraints or loopholes in the system which can be utilised by all WTO Members. Section IV extends beyond the DSS to consider the broader issue relating to overwhelming criticisms about China’s failure to adhere to the spirit of WTO law and the WTO’s failure to push China to change its state-led economic model and transition to a full-fledged market economy. Section V sets forth some concluding remarks.

II. EFFECTIVENESS

The efficacy of WTO rules would be significantly weakened without an effective mechanism that enforces the rules. The DSS, in serving this key function, has long been praised as ‘the jewel in

the crown’ of the multilateral trading system. Since commencing its operation in 1995, the DSS has managed over 600 disputes, which demonstrates WTO Members’ continued belief in the utility of the system. Despite the United States (US)’s criticisms of the Appellate Body, it sees the value of the DSS in resolving trade disputes (USTR 2021) and continues to resort to the system for that purpose.

When it comes to the implementation of WTO rulings, there is evidence to show that the DSS is largely effective in inducing compliance in most cases (Davey 2014; WTO 2017(a)). Yet, the impact of the system on China remains controversial. The US, under the Trump administration, vehemently criticised the WTO for being “incapable of fundamentally changing [China’s] trade regime that broadly conflicts with the fundamental underpinnings of the WTO system” (USTR 2020(a), p.14). This perception of the WTO’s ineffectiveness was a key driver of the US’s recourse to unilateral actions that provoked the US-China trade war. The US’s concern and approach have not fundamentally changed under the Biden administration. In a recent speech, USTR Katherine Tai criticised “China’s lack of adherence to global trading rules” and failure to make “meaningful reforms to address the concerns” about “its state-centered economic system” and reiterated the need for the US to use all tools at its disposal including by creating new ones “to defend American economic interests from harmful policies and practices” (CSIS 2021). These concerns are shared by other major WTO Members particularly the European Union (EU) (European Commission 2021).

There is little doubt that the current WTO rules and the DSS have their limits, some of which will be considered in Section III. However, these limits have largely resulted from the way in which the rules and the DSS are designed by WTO Members and hence can only be addressed through their collective efforts. In other words, many perceived problems in the multilateral trading system that may have caused its lack of effectiveness are not specific to China. Thus, an assessment of the effect of the DSS on China must be undertaken objectively in light of these systemic constraints or loopholes that can be utilised by all Members.

Against this backdrop, I briefly discuss China’s compliance with adverse WTO rulings and the impact of the DSS on China’s economic reform and policymaking below. As noted above, China has been a respondent in 47 disputes involving a total of 34 matters. Among the 34 cases, 24 have been completed either through a mutually agreed solution (12 cases) or China’s implementation of WTO rulings (12 cases). As regards the other ten cases, nine remain in the litigation process and one has lapsed as the panel’s work was suspended for more than 12 months under Article 12.12 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (WTO 2018(a)). One may also divide these disputes into non-trade-remedy cases and trade remedy cases which can be brought by the countries subject to antidumping (AD) and/or countervailing duties (CVD) only. Among the 24 completed cases, the US was the sole or a joint complainant in 15 out of the 17 non-trade-remedy cases. Table 1 below provides a summary of the completed cases, the major measures and goods/industries involved, and their duration from consultations to settlement/implementation. For trade remedy cases (highlighted in grey), the duration covers the period between the imposition and the termination of the duties.

Table 1 Completed WTO Disputes involving China as a Respondent 2001-2021

	Short title (DS No.)	Complainant(s)	Measures (Industries/Goods/Entities)	Duration

Settled Disputes (10 cases)				
1.	<i>China – VAT on Integrated Circuits</i> (DS309)	US	Discriminatory value-added tax (VAT) rebates (integrated circuits producers and design services providers)	Mar 2004 – July 2004
2.	<i>China – Taxes</i> (DS358, 359)	US, Mexico	Tax preferences (foreign-invested enterprises)	Feb 2007 – Jan 2008
3.	<i>China – Financial Information Services</i> (DS372, 373, 378)	US, EC, Canada	Market access restriction and discrimination (financial information services providers)	Mar 2008 – Dec 2008
4.	<i>China – Grants, Loans and Other Incentives</i> (DS387, 388, 390)	US, Mexico, Guatemala	Export subsidies (all kinds of Chinese merchandise recognised as 'famous brands')	Dec 2008 – Dec 2009
5.	<i>China – Fasteners</i> (DS407)	EU	AD (fasteners)	Dec 2009 – ongoing (2 nd sunset review commenced in Jun 2021)
6.	<i>China – Wind Power Equipment</i> (DS419)	US	Subsidies based on local content requirements (wind power equipment)	Dec 2010 – Feb 2011
7.	<i>China – Autos and Auto Parts</i> (DS450)	US	Export subsidies (auto and auto parts)	Sep 2012 – Apr 2016 (settled as part of DS489)
8.	<i>China – Apparel and Textile Products</i> (DS451)	Mexico	Subsidies (apparel and textile, cotton and chemical fibres)	Oct 2012 – Mexico did not pursue further
9.	<i>China – Demonstration Bases</i> (DS489)	US	Export subsidies (7 industries and many sub-sectors)	Feb 2015 – Apr 2016
10.	<i>China – Aircraft</i> (DS501)	US	Discriminatory VAT exemptions (aircraft)	Dec 2015 – Oct 2016
11.	<i>China – Raw Materials II (US)</i> (DS508)	US	Export duties (raw materials)	Jul 2016 – 2017
12.	<i>China – Raw Materials II (EU)</i> (DS509)	EU	Export duties and restraints (raw materials)	Jul 2016 – 2017
Litigated Disputes (12 cases)				
13.	<i>China – Auto Parts</i> (DS339, 340, 342)	EC, US, Canada	Discriminatory internal charges (auto parts)	Mar 2006 – Aug 2009
14.	<i>China – Intellectual Property Rights</i> (DS362)	US	Inadequate IPR protection (copyright of content goods and trademark regarding confiscated imported goods)	Apr 2007 – Mar 2010
15.	<i>China – Publications and Audiovisual Products</i> (DS363)	US	Trading rights and distribution services (cultural sector)	Apr 2007 – Mar 2012 (MOU with the US on film in May 2012)
16.	<i>China – Raw Materials</i> (DS394, 395, 398)	EC, US, Mexico	Export duties and restrictions (raw materials)	Jun 2009 – Jan 2013
17.	<i>China – Electronic Payment Services</i> (DS413)	US	Market access restriction and discrimination (electronic payment services)	Sep 2010 – Jul 2013
18.	<i>China – GOES</i> (DS414)	US	AD and CVD (grain oriented flat-rolled electrical steel)	Apr 2010 – Apr 2015
19.	<i>China – X-Ray Equipment</i> (DS425)	EU	AD (X-Ray Equipment)	Jan 2011 – Feb 2014
20.	<i>China – Broiler Products</i> (DS427)	US	AD and CVD (broiler)	Aug/Sep 2010 (CVD/AD) – Feb 2018
21.	<i>China – Rare Earths</i> (DS431, 432, 433)	US, EU, Japan	Export duties and restrictions (rare earths)	Mar 2012 – May 2015
22.	<i>China – Autos (US)</i>	US	AD and CVD (autos)	Dec 2011 – Dec 2013

	(DS440)			
23.	<i>China – HP-SSST</i> (DS454, 460)	Japan, EU	AD (high-performance stainless steel seamless tubes)	Nov 2012 – Aug 2016
24.	<i>China – Cellulose Pulp</i> (DS483)	Canada	AD (cellulose pulp)	Apr 2014 – Apr 2019

This section considers the non-trade-remedy cases while the trade remedy cases will be examined in Section III as they create some unique challenges for enforcement. As discussed in detail elsewhere, in all the completed non-trade-remedy cases China maintained a good record of compliance, more favourable than those of the other key players in the system (Zhou 2019). This record is strong evidence of the effective influence of the DSS on China, which has caused not only changes to specific policy instruments but also systematic adjustments of China’s complex regulatory regime in an incremental manner. More specifically, these disputes pushed China to repeal or modify laws, regulations and other policy instruments which led to the application of:

- (1) **discriminatory internal taxes** including VAT rebates in the integrated circuits (IC) industry (WTO 2005), VAT exemptions in the aircraft industry (Zhou 2019, p.35) and internal charges in the auto parts sector (WTO 2009, p.21);
- (2) **subsidies** in a variety of forms at both national and local levels which were primarily aimed at fostering China’s industrial policies in select sectors such as wind towers (USTR 2012, p.51), auto and auto parts, textiles, agriculture, medical products, light industry, special chemical engineering, new materials, and hardware and building materials (USTR 2015; WTO 2016(a); USTR 2016) or more broadly at promoting exports of famous brands of Chinese merchandise in all sectors (USTR 2009) or attracting foreign investment (WTO 2008(a));
- (3) **export duties and restrictions** on a list of raw materials and rare earths (WTO 2013(a); WTO 2015, p.18);
- (4) **restrictions on the right to import** reading materials, audio-visual products, sound recordings and films for theatrical release in the cultural industries and **restrictions on the supply of distribution services**, i.e. the right of foreign-invested enterprises to engage in the wholesaling and retailing, of these cultural goods (WTO 2012(a));
- (5) **certain restrictions on market access for and discriminatory requirements on foreign services suppliers** in the financial information services sector (WTO 2008(b)) and the electronic payment services sector (WTO 2013(b)); and
- (6) **inadequate protection of intellectual property rights (IPRs)** including copyright and related rights for goods containing prohibited content and trademarks in relation to goods confiscated by Chinese customs due to IPR infringements (WTO 2010).

It is true that China’s compliance in these disputes was confined to strictly addressing the findings of inconsistencies by WTO tribunals. Nevertheless, like all other Members, China is not required to change any measures or practices that are not found to be in breach of WTO rules. China’s approaches to implementation have shown its growing sophistication in the DSS with full comprehension of the limits of WTO rulings and how to implement the rulings in a narrow but adequate fashion.

However, even such ‘narrow’ implementation has required some significant changes to China’s economic policies, showing the broad and systemic impact that the DSS can have on

domestic policymaking. The most notable example is the *China – Publications and Audiovisual Products* case, which was also the most difficult to implement due to the sensitivity of the cultural sector in China and the need for coordinated efforts by multiple departments or ministries of the State Council to revise a range of jointly-published measures. China abolished or revised all WTO-inconsistent measures (other than two measures applied to films) in order to lift restrictions on the right to import the cultural goods involved. This was a significant step toward the dismantling of China’s state monopoly of trading rights in the cultural sector which was long regarded by the Chinese government as being essential for maintaining a rigorous censorship system to safeguard fundamental social values and political interests (Shi & Chen 2011). While China was not required to reduce the rigour of its censorship, the WTO rulings effectively pushed China to disentangle trading rights from censorship so that all entities are entitled to engage in the importation of the relevant goods. Although China failed to liberalise the right to import films apparently due to the resistance of the state entities involved (Zhang and Li 2014, p.159), it entered into a memorandum of understanding with the US granting more market access to US films, a step toward further liberalisation of the market (WTO 2012(b)). Notably, this was China’s only major failure of compliance in all the completed disputes.

Another example concerns China’s application of export duties and restrictions on raw materials and rare earths. While these measures were initially imposed to drive up world prices and hence China’s earnings from the sale of these goods (Lardy 2002, p.47), at the time of the dispute they had become part of China’s policy prescriptions to safeguard the security of exhaustible natural resources and sustainable development (Information Office of the State Council 2012). Thus, this dispute raised some fundamental and sensitive issues relating to states’ economic sovereignty over natural resources and prerogative rights to prevent the depletion of these resources and protect the environment. Moreover, while export duties are generally allowed under the WTO and are widely used by WTO Members for various regulatory goals, China is obliged to eliminate all such taxes and charges (subject to certain exceptions) under Section 11.3 of the *Protocol on the Accession of China* (Accession Protocol). Moreover, China has no recourse to the general exceptions to WTO rules (such as protection of exhaustible natural resources and the environment) to justify a deviation from this obligation, as the Appellate Body held in these disputes. That is, China cannot use export duties and charges for any legitimate policy objectives. Despite the strategic importance of China’s regulatory goals and the (unreasonable) rigidity of the WTO rulings, China removed all the WTO-illegal measures.

The final example concerns the disputes in which China took tremendous effort to eliminate a wide range of subsidies applied across many industries at both national and local levels, as noted above. China’s implementation goes against the widespread concerns about the potential difficulties of challenging Chinese subsidies due to a lack of transparency. To the contrary, most Chinese industrial subsidies take the typical forms contemplated in the WTO *Agreement on Subsidies and Countervailing Measures* (ASCM), and it is possible for WTO Members to use the existing rules and the DSS to push China to remove or reduce these subsidies that harm their interests (Zhou and Fang 2021). In addition, one must take into account the numerous AD and CVD actions against Chinese exports, which are frequently used to address the Chinese government’s intervention in the market including through subsidies (Nedumpara and Zhou 2018). Here, while there is a longstanding and ongoing debate about the Appellate Body’s “authority-based” test for determining whether a granting entity constitutes a “public body”, this

test did not prevent investigating authorities from finding Chinese state banks and state-owned enterprises (SOEs) as public bodies (Appellate Body Report 2011; Appellate Body Report 2019). In addition, China’s WTO-plus obligations under Section 15(b) of the Accession Protocol provide wide latitude for authorities to apply countervailing measures so as to counteract the negative effects of Chinese subsidies (Zhou and Fang 2021).

The above analysis is not to suggest that China’s decision to settle some of the disputes or implement unfavourable WTO rulings was detrimental to its own interest. In all the disputes, China’s decision was driven by a mix of factors including consideration of reputational cost and legal capacity and resources *vis-à-vis* the feasibility and complexity of litigation and compliance (Ji and Huang 2010; Yang 2015). More importantly, it also involved careful assessments of the economic and political impact of implementation, particularly whether the termination of the contested measures served China’s economic and strategic goals. For instance, the removal of the discriminatory VAT rebates in the IC industry, the subsidies to manufacturers of wind power equipment and the discriminatory internal charges in the auto parts sector was consistent with China’s reform strategies and industrial policies and had insignificant impacts on the domestic industries involved (Ngangjoh-Hodu & Zhang 2016; ICTSD 2011; Zhou 2019, pp.49-50). The liberalisation of trading rights and distribution services in the cultural sector was consistent with China’s progressive liberalisation of the sector and its effort to liberalise trading rights more generally, and did not undermine its censorship regime. The elimination of the export taxes and restrictions on raw materials and rare earths was aligned with China’s industry reform strategies (Wang 2018) and did not jeopardise China’s pursuit of conservation and environmental goals. Accordingly, one may argue that at the core of China’s approaches to WTO compliance has been the use of the DSS as an external lever to facilitate domestic economic reforms while at the same time, limiting the impacts of the WTO rulings on its pursuit of chosen policy objectives. This approach will remain essential for any discussion of China’s engagement in the DSS including responses to adverse rulings in future disputes.

III. CHALLENGES

Despite China’s good record of implementing WTO rulings, its approaches and subsequent regulatory activities have revealed some systemic issues in the DSS. Below, I consider three major challenges and explain why they are not China-specific: (1) temporary breaches, (2) repetitive breaches and (3) post-compliance developments. The issue of temporary breaches is mainly associated with the lengthy process of WTO litigation, which provides room for a defaulting Member to use the process to buy time for WTO-illegal measures. The lack of retrospective remedies under the DSS further incentivises such practices (Wu 2017). The other two issues are an extension of temporary breaches and are also based on the abuse of the dispute settlement process. However, they involve some additional features. Repetitive breaches involve the application of the same policy instruments or practices which were found to be WTO-inconsistent in past disputes. Repetitive breaches are possible because WTO rulings in a dispute are generally constrained by the facts, claims and evidence in that particular case and are “not binding precedents for other disputes between the same parties on other matters or different parties on the same matter, even though the same questions of WTO law might arise” (WTO 2003). The issue of post-compliance developments concerns the introduction of new measures

in similar or different forms as those adjudicated in past disputes for existing or new policy objectives. This issue not only shows the limitation of the DSS in general but also raises the question of how WTO Members balance the pursuit of domestic policy objectives with the observance of WTO rules more broadly.

Table 1 above shows that all the litigated non-trade-remedy disputes took three or more years between the commencement of consultations and implementation. The *China – Publications and Audiovisual Products* case took five years due to the sensitivity and complexity of compliance as discussed above. Given the clear breach of China’s WTO accession commitments, one may argue that China deliberately chose to maintain the restrictions on trading rights in the cultural sector and used the dispute settlement process to buy time for its sectoral reforms.

Another example is the *China – Auto Parts* case which took around 3.5 years. This period of temporary breach provided extra time for China’s auto parts industry to further restructure and grow under the protection of the discriminatory internal charges. When China terminated the measures, its auto industry had already become the second largest worldwide in terms of production volume (Tang 2009). This case can also be used to illustrate the issue of post-compliance developments. In light of its upgraded industrial policies for technological advancement and global competitiveness, China has resorted to other measures to advance the auto industry, with the new energy vehicles (NEVs) sector being the most notable example. To promote innovation and the production capability of NEVs, China has been providing massive subsidies and other supportive measures at both national and local levels (Fang and Zhou 2021). While the DSS was effective in pushing China to remove a wide range of subsidies including in the auto industry (see Section II), China’s compliance in a specific dispute does not preclude it from introducing similar measures afterwards. Given China’s approaches to compliance, it is likely to continue to prioritise domestic policy objectives over the observance of WTO rules, and when necessary, pursue the objectives through WTO-incompatible means.

The *China – Raw Materials* and *China – Rare Earths* disputes offer an illustration of repetitive breaches. In both disputes, what China was required to change or remove were temporary instruments, i.e. export tariffs and quotas, which are updated and issued on an annual basis. The involvement of such temporary measures not only made it easy for China to implement but also provided room for China to reintroduce these measures. In 2016, merely one year after China’s implementation, the US and the EU challenged the same measures at the WTO as China maintained export restrictions on a range of raw materials that were not covered in the previous disputes. Although China quickly removed these measures (USTR 2017, p.31; USTR 2018(a), p.35), it would be possible for a WTO Member to litigate and use the proceedings to prolong the life of the measures in such circumstances.

The challenges discussed above are not China-specific and apply to all WTO Members. There are many examples. A well-known one is the US’s practice of ‘zeroing’ in AD actions despite a series of WTO rulings against it (Prusa and Rubini 2013). Another is the protracted WTO proceedings concerning the US’s and the EU’s subsidisation of their own national champions in the aviation sector (Reuters 2020; Crivelli and Rubini 2020). More generally, the fact that the US and the EU are the top two respondents in the DSS as well as the largest targets in compliance proceedings and retaliation requests (Reich 2017) suggests that these more sophisticated players have used the systemic constraints and loopholes in the DSS even more frequently. As Krikorian has observed:

the US government has acted in its own self-interest and thwarted the potential impact of the dispute settlement mechanism either by effectively ignoring its decisions or by implementing them in such a way as to minimise their overall effect (Krikorian 2012, p.81).

Thus, China’s approaches to WTO compliance demonstrate that it has merely become a similarly sophisticated player.

As flagged above, trade remedy cases have presented some distinctive features and challenges. China’s approach to compliance has routinely involved the initiation of a re-investigation, an approach adopted in the *Interim Rules on the Implementation of the Rulings of the World Trade Organization on Trade Remedy Disputes* published by China’s Ministry of Commerce (MOFCOM) in 2013. Since the MOFCOM’s decisions to modify or terminate an existing measure rely on re-investigations, such an investigation does not cause a suspension of the measure and may result in a decision to maintain it. Where a re-investigation leads to the continuation of an existing measure (at the original or a modified rate), compliance would only be achieved if the re-investigation had sufficiently addressed the substantive and/or procedural deficiencies in the original investigation. Given the technicality and complexity of these issues, it would be considerably more difficult to ascertain the adequacy of compliance in trade remedy cases than in non-trade-remedy cases without resorting to compliance proceedings. Thus, re-investigation may well be (ab)used to trigger compliance proceedings and hence prolong the life of AD/CVD measures. As shown in Table 1, most of the trade remedy disputes have seen Chinese AD/CVD duties staying in place for years close to or until the time for sunset reviews, or even extended for another period of time after such a review. Such practices not only offer a perfect illustration of temporary breaches but also raises the issue of repetitive breaches given the similarities of the substantive and procedural issues in MOFCOM’s investigations that were challenged in these disputes (Zhou 2019, pp.158-78). As a WTO decision is binding on the parties to that specific dispute only, it does not prevent the MOFCOM from repeating the same or similar practices in subsequent investigations. Again, such temporary breaches and repetitive breaches are not specific to China. Since 1995, a majority of WTO disputes have focused on trade remedies (WTO 2017(b)). Yet, the effect of the DSS on inducing compliance in trade remedy disputes has been relatively limited. The core cause of the limitation is that WTO’s findings of violations often concern the application of domestic trade remedy legislation in individual investigations (i.e. an ‘as applied’ breach) rather than the legislation *per se* (i.e. an ‘as such’ breach). Piecemeal attacks tend to be ineffective at ensuring meaningful compliance or systemic changes of a Member’s regulatory regime and practices (Mitchell and Prusa 2016). Given the rampant (ab)use of trade remedies particularly AD worldwide, it is unlikely that China will retreat from its current practices. In recent years, we have seen China’s AD actions continuing to flourish and MOFCOM’s growing sophistication in reproducing the practices of the US, the EU and Australia to retaliate against their treatment of China as a non-market economy (NME) in AD actions (Zhou and Qu 2021).

IV. BROADER ISSUES

Beyond the specific challenges for the DSS, the broader question is whether China has fulfilled its WTO obligations. As noted in Section II, the overwhelming criticism has focused on China’s failure to adhere to the spirit of the world trade rules and the ineffectiveness of the WTO to

compel China to change its state-led economic model and become a full-fledged market economy. In the WTO’s latest Trade Policy Review of China between 20-22 October 2021, the US, the EU, the United Kingdom and Australia reiterated these fundamental concerns (Lester 2021). In contrast, China stated that it is committed to “developing new systems for an open economy”, to “creating a market-oriented, law-based, and internationalized business environment”, and to “comprehensively deepening reform, fully leverag[ing] the decisive role of the market in allocating resources and giv[ing] better play to the role of government to ensure better alignment between an efficient market and a well-functioning government”. Its goal is to carry on the over four decades of economic reform and opening up “towards fully building a modern socialist country” (WTO 2021). The interesting questions here are “do China’s WTO commitments require a fundamental change to its economic model and a transition to a Western-type market economy?”, and “if this was indeed the expectation of some WTO Members during China’s WTO accession negotiations, did these Members manage to incorporate relevant commitments in China’s accession instruments that reflect such expectation?” These questions cannot be fully addressed in this chapter. But some general observations are provided below.

On the one hand, let’s consider Section 15(a) of China’s Accession Protocol which sets out a special AD rule allowing WTO Members to treat China as an NME in AD investigations. This special rule is subject to an expiry date contemplated in Section 15(d), that is, fifteen years after China’s entry into the WTO until 11 December 2016. The US and the EU continued to apply the special rule after the expiry date arguing that Section 15(d) does not terminate their right to use the special rule but merely causes a shift of burden of proof from China/Chinese producers to investigating authorities. China challenged the practices of the US and the EU in two separate disputes immediately after the expiry date (WTO 2016(b); WTO 2016(c)). China did not proceed with the case against the US and eventually suspended the case against the EU so that there were no published WTO rulings. Setting aside the highly complex technical issues, the US contended that China was expected to transition to a full market economy or the special AD rule will continue to apply (USTR 2017). For China, however, the US’s contention “is beyond the imagination of those ... who actually participated in the negotiations” as there was a clear agreement that the special rule shall exist for fifteen years only (MOFCOM 2017). My assessment, based on detailed research of the limited negotiating record between the US and China (which was key to China’s WTO accession negotiations), is that China regarded the special AD rule as blatantly discriminatory and initially rejected it. Due to the US’s insistence, the two sides reached a compromise that the special rule must be subject to an expiration timeframe. This eventually led to the inclusion of the sunset clause envisaged in Section 15(d). In other words, the compromise reached was that while China accepted the special rule, the US agreed that it would remain applicable for fifteen years only (Zhou and Peng 2018). Thus, this compromise was not based on or conditional upon whether China transitions into a full-fledged market economy but was merely intended to enable WTO Members to apply a discriminatory method to facilitate AD actions against China for an agreed period of time.

On the other hand, there are some very broad commitments made by China that may be considered as a promise to a transition to a full market economy. Two of the most telling examples are paragraph 46 of the *Report of the Working Party on the Accession of China* and Section 9.1 of the Accession Protocol. While the former provides that all Chinese SOEs and state-

invested enterprises should “make purchases and sales based solely on commercial considerations”, the latter requires China to “allow prices for traded goods and services in every sector to be determined by market forces.” One may argue that the expectation of WTO Members that China becomes a full market economy may have been embodied in such broad obligations, although even these obligations do not entail a commitment by China to fundamentally change its economic model. In any event, these obligations provide considerable room for WTO Members to challenge the Chinese government’s intervention (including via SOEs) in the market and thereby address the associated market distortions or unfair trade practices (Zhou, Gao and Bai 2019). Since these China-specific rules have never been utilised, what is needed is perhaps not additional disciplines on China but more use of the existing rules. However, if more rules are desirable, then WTO Members will need to ensure these rules incorporate clearer commitments from China that reflect their expectation.

Compared with the controversies above, the lack of transparency in the Chinese economic and political system is almost a consensus among governments and other stakeholders and commentators. This issue has persistently made it difficult for WTO Members to understand and monitor China’s trade practices. For example, the WTO Secretariat Report on the latest Trade Policy Review of China noted that the information on China’s industrial subsidies remains strikingly inadequate particularly due to the involvement of SOEs even though China claimed to have made a full notification of subsidies in 2019 (WTO 2021(a), p.16 ; WTO 2021(b), pp.76-77). The lack of transparency also creates a major complication in the assessment of China’s compliance with WTO rulings. For instance, while China formally removed the restrictions on trading rights in the cultural sector, it remains unclear how such rights are granted (or denied) in practice and whether applications for becoming an eligible import entity are assessed objectively based on the statutory criteria rather than by discretion.

The issue of “forcing technology transfer” offers another good example. Upon WTO accession, China promised that “approval for importation, the right of importation or investment by national and sub national authorities” will not be conditional upon the transfer of technology under Section 7(3) of the Accession Protocol. Despite this promise, the US and the EU took a series of actions to stop China from practices of “forcing technology transfer”. They each challenged the relevant laws and practices at the WTO (WTO 2018(a); WTO 2018(b)), and the US also conducted a meticulous assessment of Chinese practices in its Section 301 investigations (USTR 2018(b)). Subsequently, the US-China Phase One Trade deal included more detailed disciplines on this issue (USTR 2020(b)), and China introduced a provision in its new Foreign Investment Law 2020 to prohibit “all administrative organs and their employees ... [from] forcing technology transfer through administrative means.” Despite all these effort, it will remain difficult to monitor how these commitments and laws are implemented in practice without enhanced transparency in China’s foreign investment review regime (Zhou, Jiang and Kong 2020).

Finally, it is worth pointing out that the combination of state influence in commercial activities and lack of transparency does pose some systemic and existential challenges for the world trading system. In the recent trade tensions between Australia and China, for instance, China was reported to have restricted the importation of Australian coal through informal instructions of the Chinese government to state-owned importers without a formal measure or decision of the relevant authorities (Tan 2020). Such practices not only make it hard for WTO Members to

challenge Chinese measures but also raise the broader issues of whether China’s economic model is compatible with the world trading system and whether the WTO is adequate to cope with China. At the same time, such practices are detrimental to China’s own long-term interest as they would only undercut China’s credibility in the international community and reinforce the longstanding concerns about its regulatory and political regime.

V. CONCLUDING REMARKS

China’s entry into the WTO is a momentous event in the eight decades of evolution of the multilateral trading system. The impact of the WTO on China is undeniably phenomenal given China’s unparalleled and sweeping WTO commitments and impressive record of implementation in light of its unprecedented economic reforms. In its twenty years of WTO membership, China has also maintained a good record of compliance with adverse WTO rulings despite the persistent and increasingly acute criticisms about its economic and political model. This record shows that the DSS can have a positive influence on China. While China’s compliance has also demonstrated some systemic constraints or loopholes in the system, these are not China-specific and can be utilised by all WTO Members. The absence of a functioning Appellate Body, however, has greatly affected the efficacy of the DSS and may cause irreparable damages to the credibility and integrity of the entire multilateral trading system. Following the US’s and the EU’s abuse of their right of appeal to block unfavourable panel rulings in several disputes, China also ‘appealed into the void’ in one of the latest cases after the panel found in favour of the US’s imposition of safeguards measures on certain Chinese crystalline silicon photovoltaic products (WTO 2021(c)). If the DSS remains so dysfunctional and other major players continue to abuse the system, then China will be increasingly disincentivised to comply with WTO rulings or to seek to comply with its WTO obligations in domestic policymaking. Over time, countries that are keen to push China to further economic reforms will lose an important policy option (i.e. multilateral disciplines) while other approaches (i.e. unilateral measures) have proven less effective or even counter-productive in dealing with the rising global superpower.

REFERENCES

Appellate Body Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R (adopted 25 March 2011).

Appellate Body Report, *United States – Countervailing Duty Measures on Certain Products from China – Resources to Article 21.5 of the DSU by China*, WT/DS437/AB/RW (adopted 15 August 2019).

Center for Strategic & International Studies (CSIS), ‘A Conversation with Ambassador Katherine Tai, U.S. Trade Representative’ (4 October 2021), available at: www.csis.org/analysis/conversation-ambassador-katherine-tai-us-trade-representative.

Crivelli, Pramila and Rubini, Luca, ‘Flying High in a Plane’ Appellate Body Report, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*, (2020)19(2) *World Trade Review* 316.

Davey, Williams, ‘The WTO and Rules-Based Dispute Settlement: Historical Evolution, Operational Success, and Future Challenges’, (2014)17(3) *Journal of International Economic Law* 679.

European Commission, ‘Trade Policy Review – An Open, Sustainable and Assertive Trade Policy’, COM(2021)66 Final (18 February 2021), available at: <https://ec.europa.eu/transparency/regdoc/rep/1/2021/EN/COM-2021-66-F1-EN-MAIN-PART-1.PDF>.

Fang, Meng and Zhou, Weihuan (2021), ‘Greening the Road: China’s Low-Carbon Energy Transition and International Trade Regulation’ (on file).

Gao, Henry, ‘China’s Ascent in Global Trade Governance: From Rule Taker to Rule Shaker, and Maybe Rule Maker?’ in Carolyn Deere-Birkbeck (ed), *Making Global Trade Governance Work for Development* (Cambridge: Cambridge University Press, 2011) 153-180.

Information Office of the State Council, 《中国的稀土状况与政策》 [Situations and Policies of China’s Rare Earth Industry] (20 June 2012), available at: www.scio.gov.cn/zfbps/ndhf/2012/Document/1175419/1175419.htm.

International Centre for Trade and Sustainable Development (ICTSD), ‘US Proclaims Victory in Wind Power Case; China Ends Challenged Subsidies’ (ICTSD, 13 June 2011), available at: <https://ictsd.iisd.org/bridges-news/bridges/news/us-proclaims-victory-in-wind-power-case-china-ends-challenged-subsidies>.

Ji, Wenhua and Huang, Cui, ‘China’s Path to the Center Stage of WTO Dispute Settlement: Challenges and Responses’, (2010)5(9) *Global Trade and Customs Journal* 365.

Ji, Wenhua and Huang, Cui, ‘China’s Experience in Dealing with WTO Dispute Settlement: A Chinese Perspective’, (2011)45(1) *Journal of World Trade* 1.

Krikorian, Jacqueline, *International Trade Law and Domestic Policy* (Vancouver: UBC Press, 2012).

Lardy, Nicholas, *Integrating China into the Global Economy* (Washington DC, The Brookings Institution, 2002).

Lester, Simon, ‘Statements by Governments at China’s WTO Trade Policy Review’, China Trade Monitor (21 October 2021), available at: www.chinatrade-monitor.com/statements-by-governments-at-chinas-wto-trade-policy-review/.

Mercurio, Bryan and Tyagi, Mitali, ‘China’s Evolving Role in WTO Dispute Settlement: Acceptance, Consolidation and Activation’ in C Herrmann & J P Terhechte (eds) *European Yearbook of International Economic Law*, vol 3 (Berlin: Springer, 2012) 89-123.

Mitchell, Andrew and Prusa, Thomas, ‘China – Autos: Haven’t We Danced this Dance Before?’, (2016)15(2) *World Trade Review* 303.

Ministry of Commerce of China (MOFCOM) (2017), *European Union – Measures Related to Price Comparison Methodologies* (DS516), Opening Statement by Ambassador Zhang Xiangchen as a part of the Oral Statement of China at the First Substantive Meeting of the Panel in the Dispute (6 December 2017), available at: <http://images.mofcom.gov.cn/wto2/201712/20171213174424357.pdf>.

Nedumpara, James and Zhou, Weihuan, *Non-Market Economies in the Global Trading System: The Special Case of China* (Singapore: Springer, 2018).

Ngangjoh-Hodu, Yenkong and Zhang, Qi, *The Political Economy of WTO Implementation and China’s Approach to Litigation in the WTO* (Cheltenham: Edward Elgar Publishing, 2016).

Prusa, Thomas and Rubini, Luca, ‘United States – Use of Zeroing in Anti-Dumping Measures Involving Products from Korea: It’s déjà vu all over again’, (2013)12(2) *World Trade Review* 409.

Reich, Arie, ‘The Effectiveness of the WTO Dispute Settlement System: A Statistical Analysis’, EUI Working Papers Law 2017/11.

Reuters, ‘Timeline: Highlights of the 16-Year Airbus, Boeing Trade War’, Reuters (15 February 2020), available at: www.reuters.com/article/us-wto-aircraft-timeline/timeline-highlights-of-the-16-year-airbus-boeing-trade-war-idUSKBN20901R.

Shaffer, Gregory and Gao, Henry, ‘China’s Rise: How It Took on the U.S. at the WTO’, 2018(1) *University of Illinois Law Review* 115.

Shi, Jingxia and Chen, Weidong, ‘The “Specificity” of Cultural Products versus the “Generality” of Trade Obligations: Reflecting on “China – Publications and Audiovisual Products”’, (2011)45(1) *Journal of World Trade* 159.

Tan, Su-Lin, ‘China-Australia Relations: Canberra ‘Very Concerned’ over Reports of ‘Discriminatory’ Coal Ban’, *South China Morning Post* (16 December 2020), available at: www.scmp.com/economy/china-economy/article/3114066/china-australia-relations-canberra-very-concerned-over.

Tang, Rachel, *The Rise of China’s Auto Industry and Its Impact on the US Motor Vehicle Industry* (Congressional Research Service, 16 November 2009), available at: <https://sgp.fas.org/crs/row/R40924.pdf>.

Toohy, Lisa, ‘China and the World Trade Organization: The First Decade’, (2011)60(3) *International and Comparative Law Quarterly* 788.

USTR (2009), ‘United States Wins End to China’s ‘Famous Brand’ Subsidies after Challenge at WTO; Agreement Levels Playing Field for American Workers in Every Manufacturing Sector’ (Press Release, 18 December 2009) available at: <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2009/december/united-states-wins-end-china%E2%80%99s-%E2%80%9Cfamous-brand%E2%80%9D-sub>.

USTR (2012), *2012 Report to Congress on China’s WTO Compliance* (December 2012), available at: <https://ustr.gov/sites/default/files/uploads/2012%20Report%20to%20Congress%20-%20Dec%2021%20Final.pdf>.

USTR (2015), ‘United States Launches Challenge to Extensive Chinese Export Subsidy Program’, (Press Release, 2 February 2015), available at: <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2015/february/united-states-launches-challenge>.

USTR (2016), ‘Chinese Export Subsidies Under the “Demonstration Bases-Common Service Platform” Program Terminated Thanks to U.S.-China Agreement’, (Press Release, 4 April 2016), available at: <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2016/april/chinese-export-subsidies-under>.

USTR (2017), *European Union – Measures Related to Price Comparison Methodologies* (DS516), Third Party Submission of the United States of America (21 November 2017), available at: <https://ustr.gov/sites/default/files/enforcement/DS/US.3d.Pty.Su.pdf>.

USTR (2018)(a), *2017 Report to Congress on China’s WTO Compliance* (January 2018), available at: <https://ustr.gov/sites/default/files/files/Press/Reports/China%202017%20WTO%20Report.pdf>.

USTR (2018)(b), *Findings of the Investigation into China’s Acts, Policies and Practices Related to Technology Transfer, Intellectual Property, and Innovation Under Section 301 of the Trade Act of 1974* (22 March 2018), available at: <https://ustr.gov/sites/default/files/Section%20301%20FINAL.PDF>.

USTR (2019), *2018 Report to Congress on China’s WTO Compliance* (February 2019), available at: <https://ustr.gov/sites/default/files/2018-USTR-Report-to-Congress-on-China%27s-WTO-Compliance.pdf>.

USTR (2020)(a), *2019 Report to Congress on China’s WTO Compliance* (March 2020), available at: https://ustr.gov/sites/default/files/2019_Report_on_China%E2%80%99s_WTO_Compliance.pdf.

USTR (2020)(b), *Economic And Trade Agreement Between The Government Of The United States Of America And The Government Of The People’s Republic Of China* (15 January 2020), available at: <https://ustr.gov/countries-regions/china-mongolia-taiwan/peoples-republic-china/phase-one-trade-agreement/text>.

USTR (2021), ‘Ambassador Katherine Tai’s Remarks As Prepared for Delivery on the World Trade Organization’ (14 October 2021), available at: <https://ustr.gov/about-us/policy-offices/press-office/speeches-and-remarks/2021/october/ambassador-katherine-tai-remarks-prepared-delivery-world-trade-organization>.

Wang, Chenxi, ‘WTO Rare Earths Case’s Influence on China’s Domestic Regulatory Changes’, (2018)52(2) *Journal of World Trade* 307.

Wu, Mark, ‘China’s Export Restrictions and the Limits of WTO Law’, (2017)16(4) *World Trade Review* 673.

WTO (2003), ‘Dispute Settlement System Training Module – Legal effect of panel and appellate body reports and DSB recommendations and rulings’ (July 2003), available at: www.wto.org/english/tratop_e/dispu_e/dispu_settlement_cbt_e/c7s2p1_e.htm.

WTO (2005), *China – Value-Added Tax on Integrated Circuits*, Notification of Mutually Agreed Solution, WT/DS309/8 (6 October 2005).

WTO (2008)(a), *China – Certain Measures Granting Refunds, Reductions or Exemptions from Taxes and Other Payments*, Communication from China and the United States, WT/DS358/14 (4 January 2008).

WTO (2008)(b), *China – Measures Affecting Financial Information Services and Foreign Financial Information Suppliers*, Joint Communication from China and the United States, WT/DS373/4 (9 December 2008).

WTO (2009), DSB Minutes of Meeting, WT/DSB/M/273 (6 November 2009).

WTO (2010), *China – Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, Status Report of China, WT/DS362/14/Add 2 (9 March 2010).

WTO (2012)(a), *China – Measures Affecting Trading Rights and Distribution Services for certain Publications and Audiovisual Entertainment Products*, Status Report by China – Addendum, WT/DS363/17/Add 14 (13 March 2012).

WTO (2012)(b), *China – Measures Affecting Trading Rights and Distribution Services for certain Publications and Audiovisual Entertainment Products*, Joint Communication from China and the United States, WT/DS363/19 (11 May 2012).

WTO (2013)(a), *China – Measures Related to the Exportation of Various Raw Materials*, Status Report by China, WT/DS394/19/Add 1, WT/DS395/18/Add 1, WT/DS398/17/Add 1 (18 January 2013).

WTO (2013)(b), *China – Certain Measures Affecting Electronic Payment Services*, Status Report by China, WT/DS413/9/Add 1 (12 July 2013).

WTO (2015), DSB Minutes of Meeting, WT/DSB/M/361 (13 July 2015).

WTO (2016)(a), *China – Measures Related to Demonstration Bases and Common Service Platforms Programmes*, Communication from China and the United States, WT/DS489/7 (19 April 2016).

WTO (2016)(b), *United States – Measures Related to Price Comparison Methodologies* (DS515), available at: www.wto.org/english/tratop_e/dispu_e/cases_e/ds515_e.htm.

WTO (2016)(c), *European Union – Measures Related to Price Comparison Methodologies* (DS516), available at: www.wto.org/english/tratop_e/dispu_e/cases_e/ds516_e.htm.

WTO (2017)(a), ‘Eleventh WTO Ministerial Conference Briefing Notes – Dispute Settlement’, available at: www.wto.org/english/thewto_e/minist_e/mc11_e/briefing_notes_e/bfdispu_e.htm.

WTO (2017)(b), *Annual Report 2017* (Geneva: World Trade Organization, 2017), available at: www.wto.org/english/res_e/booksp_e/anrep_e/anrep17_chap6_e.pdf.

WTO (2018)(a), *China – Certain Measures Concerning the Protection of Intellectual Property Rights* (DS542), available at: www.wto.org/english/tratop_e/dispu_e/cases_e/ds542_e.htm.

WTO (2018)(b), *China – Certain Measures on the Transfer of Technology* (DS549), available at: www.wto.org/english/tratop_e/dispu_e/cases_e/ds549_e.htm.

WTO (2021)(a), ‘Trade Policy Review – Report by China’, WT/TPR/G/415 (15 September 2021).

WTO (2021)(b), ‘Trade Policy Review – Report by the Secretariat’, WT/TPR/S/415 (15 September 2021).

WTO (2021)(c), *United States – Safeguard Measure on Imports of Crystalline Silicon Photovoltaic Products* (DS562), available at: www.wto.org/english/tratop_e/dispu_e/cases_e/ds562_e.htm.

Yang, Guohua, ‘China in the WTO Dispute Settlement’, (2015)49(1) *Journal of World Trade* 1.

Zhang, Xiaowen and Li, Xiaoling, ‘The Politics of Compliance with Adverse WTO Dispute Settlement Rulings in China’, (2014)23(85) *Journal of Contemporary China* 143.

Zhou, Weihuan and Peng, Delei, ‘EU – Price Comparison Methodologies (DS516): Challenging the Non-Market Economy Methodology in Light of the Negotiating History of Article 15 of China’s WTO Accession Protocol’, (2018)52(3) *Journal of World Trade* 505.

Zhou, Weihuan, *China’s Implementation of the Rulings of the World Trade Organization* (Oxford and Portland, Oregon: Hart Publishing, 2019).

Zhou, Weihuan, Gao, Henry and Bai, Xue, ‘Building A Market Economy Through WTO-Inspired Reform of State-Owned Enterprises in China’, (2019)68(4) *International & Comparative Law Quarterly* 977.

Zhou, Weihuan, Jiang, Huiqin and Kong, Qingjiang, ‘Technology Transfer Under China’s Foreign Investment Regime: Does the WTO Provide a Solution?’, (2020)54(3) *Journal of World Trade* 455.

Zhou, Weihuan and Fang, Meng, ‘Subsidizing Technology Competition: China’s Evolving Practices and International Trade Regulation’, (2021)30(3) *Washington International Law Journal* 470.

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Zhou, Weihuan and Qu, Xiaomeng, 'Confronting the 'Non-Market Economy' Treatment: The Evolving WTO Jurisprudence on Anti-Dumping and China's Recent Practices', [2021] UNSWLRS 51, available at: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3929143.