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## EU-China Trade Disputes in the WTO: Looking Back to Look Forward

**Abstract:** *Based on an overview of EU-China trade relations in the past 30 years, this article analyses the current status of EU-China trade disputes in the WTO, as well as its implications for the future. Since China joined the WTO in 2001, the EU and China have used the dispute settlement system of the WTO to solve bilateral trade disputes on several occasions. Although the numbers in that regard are not yet very large, the potential for bilateral trade disputes to significantly increase cannot be underestimated. How EU-China trade disputes in the WTO are to be managed has far-reaching implications, not only for the mutual relationship of these two key global players, but also for the global economy and the multilateral trading system at large.*

### 1. EU-China Trade Relations in Context

While the history of economic and trade relationships between the European Union (EU)<sup>1</sup> and China is rather short, that relationship is now one of the most important and valuable in the world.

When the People's Republic of China (PRC) was founded in 1949, the cold war and east-west confrontation was prevailing in international relations. Understandably, economic and trade relationships between China and the

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<sup>1</sup> For practical reasons, in this paper the author does not attempt to make a strict distinction between the two terms “European Union” (EU) and “European Communities” (EC). But note that since 1 December 2009 “European Union” has replaced “European Communities” as its official name in the WTO as well as in the outside world, while the latter continues to appear in older material. See: [http://www.wto.org/english/thewto\\_e/countries\\_e/european\\_communities\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/european_communities_e.htm)

western world were almost negligible in the following years. This reality remained largely unchanged even when a diplomatic relationship between China and the then European Economic Community (EEC) was established in May 1975. The turning point came in 1978, when China began to adopt an export-led opening up and reform strategy, in which international trade became more and more important.

Indeed, despite all the political and ideological differences between the EU and China, their complementarity and the mutual benefits to be gained in economic and trade relations are rather evident. While China is rich in labour resources and market, it is in dire need of technology and capital, where the EC has a comparative advantage. And vice versa.

In April 1978, the first EC-China trade agreement was signed, which set the stage for a bilateral trade relationship.<sup>2</sup> The following thirty years witnessed a dramatic development of this relationship. Taking the figures between 2004 and 2008 for example: export from the EU to China grew by 65 per cent in those years, reaching 78.4 billion Euro in 2008, while Europe's imports from China increased by around 18 per cent per year during the same period of time, reaching 248 billion Euro in 2008.<sup>3</sup> Currently, EU is China's largest trading partner and largest exporting market, while China is the second largest trading partner, largest importing country and third largest exporting market for EU.

**Table 1: EU trade with main partners (2008)**

Rank	Partner	Volume (mln euro)	Percentage
	EXTRA EU27	2.861.807,6	100%
1	United States	435.995,5	15.2%
2	China	326.325,0	11.4%
3	Russia	278.770,2	9.7%
4	Switzerland	177.848,3	6.2%
5	Norway	135.736,0	4,7%

Source: [http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc\\_113465.pdf](http://trade.ec.europa.eu/doclib/docs/2006/september/tradoc_113465.pdf)

<sup>2</sup> Trade Agreement of 3 April 1978 between the European Economic Community and the People's Republic of China, OJ L 123, 11.05.1978, p. 2.

<sup>3</sup> See *EU-China trade in facts and figures*, MEMO/09/375, Brussels, 04.09.2009, available at: <http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/09/375&format=HTML&aged=0&language=EN>. According to China's customs, in 2009 China-EU trade volume reached 364.09 billion US dollars, in which China exported USD 236.28 billion to the EU and imported USD 127.80 from the EU. See: Ministry of Commerce of the People's Republic of China, *Foreign Market Access Report 2010*, available at <http://gpj.mofcom.gov.cn/aarticle/d/cw/201004/20100406869158.html>

The figures above leave little doubt that a robust trade relationship constitutes an important part of the overall bilateral relationship between China and EU. Thus in 1985, the 1978 EC-China trade agreement was replaced by an EC-China Trade and Economic Co-operation Agreement<sup>4</sup> covering economic and trade relations as well as an EU-China co-operation program,<sup>5</sup> which was complemented in 1994 and 2002 by exchanges of letters establishing a broad EU-China political dialogue. Negotiations for a Partnership and Cooperation Agreement were launched in January 2007 and are now ongoing between the two sides. Most likely, the future agreement will upgrade the 1985 Trade and Cooperation Agreement, which remains the main legal framework for the EU-China trade relationship, bringing it in line with their deeper and more comprehensive twenty-first century relationship.<sup>6</sup>

However, the rapid (and overall healthy) development of the economic and trade relationship between the EU and China does not mean that there are no disagreements or conflicts of interest. The aim of this article is to analyze past EU-China trade disputes in the World Trade Organization (the WTO) and discuss their possible implications for the future. For that purpose, an overview of all those disputes is provided below.

## 2. Trade Dispute Complaints by the EU against China

While the EU became an original member of the WTO when the organisation was established in 1995, China was only accepted after fifteen years of tough accession negotiations beginning in 1986 (including bilateral negotiations with the EU), and became the WTO's 143<sup>rd</sup> member in December 2001.<sup>7</sup>

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<sup>4</sup> Agreement on Trade and Economic Cooperation between the European Economic Community and the People's Republic of China, signed on 21.05.1985 in Brussels and entered into force on 01.10.1985; Council Regulation (EEC) No 2616/85 of 16 September 1985 concerning the conclusion of a Trade and Economic Cooperation Agreement between the European Community and the People's Republic of China; OJ L 250, 19.09.1985, p. 1., <http://ec.europa.eu/world/agreements/downloadFile.do?fullText=yes&treatyTransID=783>

<sup>5</sup> Traditionally, EU-China economic co-operation focuses on development aid, but in recent year areas such as legal and judicial assistance, social reform, education, the environment, and economic development are also covered. See: [http://ec.europa.eu/delegations/china/eu\\_china/development\\_cooperation/index\\_en.htm](http://ec.europa.eu/delegations/china/eu_china/development_cooperation/index_en.htm)

<sup>6</sup> For a discussion of the negotiations, see: L. Zeng, *A Preliminary Perspective of Negotiations of EU-China PCA: A New Bottle Carrying Old Wine or New Wine or Both?*, "European Law Journal" Vol. 15, No. 1/2009, p. 121–141.

<sup>7</sup> Currently there are 153 members in the WTO. China was an original contracting party of the General Agreement on Tariffs and Trade (the GATT), the predecessor of the WTO. Yet in 1950, the Taiwan authorities, in the name of Republic of China (ROC), announced its withdrawal from the GATT. In 1986, the PRC formally applied to resume China's status as a con-

Since then, the trade rules encompassed in the WTO have become the multilateral basis for the EU-China bilateral trade relationship, and their way of settling trade disputes is also regulated by the dispute settlement system of the WTO.<sup>8</sup> So far, a total of six trade disputes have occurred between the EU and China within the WTO, four of which were initiated by the EU against China, while the other two were initiated by China against EU. In this section the four EU complaints are examined.

### **2.1. Measures Affecting Imports of Automobile Parts (DS339, 2006)**

On 30 March 2006, the European Communities (EC) requested consultations with China concerning China's imposition of measures that adversely affect exports of automobile parts from the EC to China.<sup>9</sup>

According to the EC, the challenged measures identify imported automobile parts used in the manufacture of vehicles for sale in China as fulfilling the characteristics of a whole vehicle if they are imported in excess of certain thresholds. This is the case when specific combinations of parts of an assembled vehicle are imported, or when the price of the imported parts attains 60 per cent or more of the vehicle. If these thresholds are met, the measures provide that the imported parts will be subject to charges equal to the tariffs for a complete vehicle (averaging 25 per cent), which is higher than the average 10 per cent tariff rate applicable to auto parts. These charges are assessed after the assembly of the parts into complete vehicles.<sup>10</sup>

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tracting party of the GATT. After the GATT was replaced by the WTO in 1995, China continued to negotiate its accession to the WTO until 2001. For a history of China's relationship with the GATT and the WTO. See: G. Yang, J. Cheng, *The Process of China's Accession to the WTO*, "Journal of International Economic Law" Vol. 4, No. 2/2001, p. 297–328.

<sup>8</sup> That system is established by the Uruguay Round Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) and administered by a Dispute Settlement Body (DSB). A trade dispute is initiated in the WTO when one or several member(s) request a consultation with another member pursuant to the DSU. Once the consultation fails, the dispute can be adjudicated, first by a panel and then by the Appellate Body. The report of the panel (when no party appeals) or the Appellate Body (when at least one party appeals) as adopted by the DSB becomes binding on the parties and, in case the losing party fails to comply with the rulings and recommendations therein, the DSB may sanction trade retaliation against it. For an overview of the dispute settlement system of the WTO see: P. Van den Bossche, *The Law and Policy of the World Trade Organization: Text, Cases and Materials*, Cambridge 2008, 2<sup>nd</sup> edition, p. 169–315.

<sup>9</sup> *China – Measures Affecting Imports of Automobile Parts – Request for Consultations by the European Communities*, WT/DS339/1, 03.04.2006. The United States and Canada also complained about the same Chinese measures, but their arguments were slightly different from those of the EC. See: *China – Measures Affecting Imports of Automobile Parts – Request for Consultations by the United States*, WT/DS340/1, 03.04.2006; *China – Measures Affecting Imports of Automobile Parts – Request for Consultations by Canada*, WT/DS342/1, 19.04.2006.

<sup>10</sup> *China – Measures Affecting Imports of Automobile Parts – Request for Consultations by the European Communities*, WT/DS339/1, 03.04.2006.

The EC considered that these measures were inconsistent with China's obligations under Article II (schedule of concessions), Article III (national treatment) of the General Agreement on Tariffs and Trade (GATT 1994), the Agreement on Trade-Related Investment Measures (the TRIMs Agreement), the Agreement on Subsidies and Countervailing Duties (the SCM Agreement) and several provisions of the Protocol on the Accession of the People's Republic of China (China's Accession Protocol).<sup>11</sup>

On the other hand, China claimed that the charge imposed under the measures was an '*ordinary customs duty*' within the meaning of Article II:1(b), rather than an '*internal charge*' subject to Article III. Furthermore, China argued that its measures were adopted to prevent the circumvention of its higher tariff rates on motor vehicles, and that any inconsistency between the challenged measures and the GATT 1994 was subject to the general exception under Article XX(d), which allows WTO members to take measures '*necessary to secure compliance with laws or regulations*' which were not inconsistent with the GATT 1994.<sup>12</sup>

In the Panel and Appellate Body proceedings, most claims of EC were supported by both the Panel and the Appellate Body. Among other findings, the Panel and the Appellate Body considered that the challenged measures subjected imported auto parts to an internal charge in excess of that applied to like domestic auto parts and accorded imported auto parts less favourable treatment than like domestic auto parts, thereby making the measures inconsistent with Article III:2 and III:4 of the GATT 1994; and rejecting China's argument that the measures justified under Article XX(d) of the GATT 1994 as measures that were necessary to secure compliance with laws or regulations which were not inconsistent with the GATT 1994.<sup>13</sup>

On 31 August 2009, China informed the DSB of the WTO that the implementation of the challenged measures concerning the importation of auto parts was ceased, and hence it had brought its measures into conformity with the DSB recommendations and rulings.

This dispute is the first dispute against China which went through the WTO dispute settlement proceedings. This contrasts, for example, with the situation in 2004 when the first WTO complaint against China was

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<sup>11</sup> Ibidem.

<sup>12</sup> See: *inter alia*, Paras. 4.139 and 4.817 of *China – Measures Affecting Imports of Automobile Parts – Report of the Panel*, WT/DS339, 340, 342/R, circulated on 18.07.2008.

<sup>13</sup> *China – Measures Affecting Imports of Automobile Parts – Report of the Panel*; *China – Measures Affecting Imports of Automobile Parts – Report of the Appellate Body*, WT/DS339, 340, 342/AB/R, circulated on 15.12.2008.

brought by the United States.<sup>14</sup> That dispute was settled when China gave up during consultations.<sup>15</sup> Also in 2004, when the EC threatened to resort to the WTO dispute settlement procedures in a potential dispute with China on the latter's export restrictions on coke, China also yielded to the demands of the EC, apparently trying to avoid a formal ruling on the merits.<sup>16</sup> However, the current dispute shows that China, with five years' experience in the WTO, is now better prepared to make full use of the court-like WTO dispute settlement system rather than settle each complaint filed against it.

## **2.2. Measures Affecting Financial Information Services and Foreign Financial Information Suppliers (DS372, 2008)**

On 3 March 2008, EC requested consultations with China with respect to measures affecting financial information services and foreign financial information service suppliers in China.<sup>17</sup>

According to the EC, the challenged Chinese measures authorised the Xinhua News Agency, the State news agency in China, to act as the regulatory authority for foreign news agencies and for foreign financial information providers. Xinhua News Agency was therefore responsible for the examination and approval procedure in respect of foreign financial information providers, and as a result these foreign suppliers needed the approval of Xinhua to operate and could only operate in China through an agent designated by Xinhua. Potential users wishing to subscribe to their services were only allowed to do so through a designated entity. The EC claimed that Xinhua News Agency had only designated the China Economic Information Service

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<sup>14</sup> See: China – Value-Added Tax on Integrated Circuits – Request for Consultations by the United States, WT/DS309/1, 23.03.2004.

<sup>15</sup> China – Value-Added Tax on Integrated Circuits – Joint Communication from China and the United States, WT/DS309/7, 16.07.2004.

<sup>16</sup> T. Hu, L. Zhang, and Z. Huang, *The Sino-EU Coke Trade Dispute and Proposals for Its Resolution*, "Wu Da Guo Ji Fa Ping Lun" (International Review of Wuhan University) Vol. 6/2007, p. 312–328.

<sup>17</sup> *China – Measures Affecting Financial Information Services and Foreign Financial Information Suppliers – Request for Consultations by the European Communities*, WT/DS372/1, 05.03.2008. The United States and Canada also complained the same Chinese measures, but their arguments were slightly different from those of the EC. See *China – Measures Affecting Financial Information Services and Foreign Financial Information Suppliers – Request for Consultations by the United States*, WT/DS373/1, 05.03.2008; *China – Measures Affecting Financial Information Services and Foreign Financial Information Suppliers – Request for Consultations by Canada*, WT/DS378/1, 23.06.2008.

(CEIS), a branch of Xinhua, as an agent and it had made the renewal of foreign financial information suppliers' licenses conditional upon the signing of agency agreements with CEIS.<sup>18</sup>

EC considered that the measures at issue were inconsistent with China's obligations under various provisions of the GATTs, the TRIPS Agreement, and China's Accession Protocol.<sup>19</sup>

On 4 December 2008, China and the EC informed the DSB that they had reached an agreement in relation to this dispute in the form of a Memorandum of Understanding. According to this Memorandum, China made several commitments to address the EC's concerns regarding the independence of the regulator of financial information services in China, including the adoption of new measures to replace the existing one, the protection of commercially valuable information belonging to foreign suppliers of financial information services, etc.<sup>20</sup>

This dispute is EC's first (and so far only) WTO complaint against China concerning trade in services.<sup>21</sup> Considering the EC's comparative advantage in this area and the great pressure it (as well as the US) has exerted on China as to the latter's opening of markets in the financial and other services sectors,<sup>22</sup> there are reasons to believe that more trade disputes will arise in this area in the near future.

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<sup>18</sup> *China – Measures Affecting Financial Information Services and Foreign Financial Information Suppliers – Request for Consultations by the European Communities*, WT/DS372/1, 05.03.2008.

<sup>19</sup> *Ibidem*.

<sup>20</sup> Memorandum of Understanding between the People's Republic of China and the European Communities Regarding Measures Affecting Foreign Suppliers of Financial Information Services. See: *Joint Communication from China and the European Communities*, WT/DS372/4, 09.12.2008. China also reached the same agreement with the United States and Canada respectively.

<sup>21</sup> China's first WTO dispute on services was launched by the US in 2007. See *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products – Request for Consultations by the United States*, WT/DS363/1, 16.04.2007. The EC participated in the consultation of this dispute as a third party rather than a complainant.

<sup>22</sup> For example, during WTO's trade policy review of China held on 31.05.2010, Mr. John Clarke, Head of the EU Delegation to the WTO, urged China to make further progress in its reform and market opening process and claimed that "[c]ontinued reform is vital for instance in the services sector—reforms for example in financial services, insurance, or telecoms could certainly contribute to the recognized need for faster development of the services sector". See: *European Union Opening Statement: Trade Policy Review of China*, 31.05.2010, Geneva, [http://trade.ec.europa.eu/doclib/docs/2010/june/tradoc\\_146211.pdf](http://trade.ec.europa.eu/doclib/docs/2010/june/tradoc_146211.pdf).



### 2.3. Measures Related to the Exportation of Various Raw Materials (DS395, 2009)

On 23 June 2009, the EC requested consultations with China with respect to China's restraints on the export from China of various forms of raw materials.<sup>23</sup>

According to the EC, China (i) imposed quantitative restrictions on the export of bauxite, coke, fluorspar, silicon carbide and zinc; (ii) imposed export duties on bauxite, coke, fluorspar, magnesium, manganese, silicon metal, yellow phosphorus and zinc; (iii) imposed additional requirements and procedures in connection with the export of the materials, including but not limited to, restricting the right to export based on, for example, prior export experience; establishing criteria that foreign-invested enterprises must satisfy in order to export that were different from those that domestic entities must satisfy; and requiring exporters to pay fees. China administers these requirements and procedures through its ministries and other organisations under the State Council, as well as chambers of commerce; (iv) maintained a minimum export price system for the materials and required the examination and approval of export contracts and export prices. China administered this system and these requirements through its ministries and other organisations under the State Council, as well as chambers of commerce.<sup>24</sup>

The EC considered that the challenged Chinese measures were in violation of Articles VIII, X, and XI of the GATT 1994, and various provisions in China's Accession Protocol.<sup>25</sup>

As bilateral consultation failed, a panel was established by the DSB to examine this dispute on 21 December 2009. The panel is expected to release its report by April 2011.

This case is one of the very few disputes in the GATT and WTO dealing with export restrictions, as the overwhelming number of previous disputes concerned import restrictions. Admittedly, existing WTO rules applicable to export restrictions are rather weak – in so far as Article XI of GATT 1994 prohibits both import and export quantitative restrictions, at least the im-

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<sup>23</sup> *China – Measures Related to the Exportation of Various Raw Materials – Request for Consultations by the European Communities*, WT/DS395/1, 25.06.2009. The United States and Mexico also complained about the same Chinese measures, and their arguments and claims were essentially the same as those of the EC. See: *China – Measures Related to the Exportation of Various Raw Materials – Request for Consultations by the United States*, WT/DS394/1, 25.06.2009; *China – Measures Related to the Exportation of Various Raw Materials – Request for Consultations by Mexico*, WT/DS398/1, 26.08.2009.

<sup>24</sup> *China – Measures Related to the Exportation of Various Raw Materials – Request for Consultations by the European Communities*, WT/DS395/1, 25.06.2009.

<sup>25</sup> *Ibidem*.



sition of export tax is not prohibited here or elsewhere.<sup>26</sup> Thus the EC relied heavily on China's Accession Protocol, where China did make specific commitments concerning the use of export taxes. So the key issue is: how will the panel and the Appellate Body relate commitments made in a member's accession protocol to the general rules of the WTO? Particularly, will a member (in this case China) be allowed to invoke Article XX (general exception) of the GATT 1994 to justify measures violating commitments in the Protocol, on the basis that the measures are used to preserve exhaustible natural resources? Whatever the result of this dispute, it will have far reaching implications not only for the parties to the dispute, but for the WTO system in general.<sup>27</sup>

#### **2.4. China — Provisional Anti-Dumping Duties on Certain Iron and Steel Fasteners from the European Union (DS407, 2010)**

On 7 May 2010, the EU requested consultations with China regarding China's provisional anti-dumping duties on certain iron and steel fasteners from the EU.<sup>28</sup>

The EU challenged the imposition, by Notice no. 115 (2009) of the Ministry of Commerce of the People's Republic of China, of provisional anti-dumping duties on certain iron and steel fasteners from the EU, which according to the EC was inconsistent with China's obligations under a number of provisions of the Anti-Dumping Agreement and the GATT 1994 of the WTO. The EU also considered that Article 56 of the Regulations of the People's Republic of China on Anti-Dumping, which provides '[w]here a country (region) discriminatorily imposes anti-dumping measures on the exports from the People's Republic of China, China may, on the basis of actual situations, take corresponding measures against that country (region)', was inconsistent with China's obligations under various provisions of the Anti-Dumping Agreement, the DSU and the GATT 1994.<sup>29</sup>

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<sup>26</sup> Thus M. Matsushita *et. al* have claimed that '[n]o provision of the GATT prohibits export taxes. As a result, Members are free to impose export taxes on products as long as they are not set at a level so as to amount to an export ban'. M. Matsushita, T.J. Schoenbaum, and P.C. Marvroidis, *The World Trade Organization: Law, Practice, and Policy*, New York 2006, 2<sup>nd</sup> edition, p.593–594.

<sup>27</sup> For an preliminary discussion of the legal issues relating to the dispute, see Z. Huang, *From 'Market Access' to 'Resources Access' — Some Thoughts on the China-Measures Related to the Exportation of Various Raw Materials Case*, "Fa Shang Yan Jiu" (Studies in Law and Business) Vol. 27, No. 3/2010, p.35–44.

<sup>28</sup> *China – Provisional Anti-dumping Duties on Certain Iron and Steel Fasteners from the European Union – Request for Consultations by the European Union*, WT/DS407/1, 12.05.2010.

<sup>29</sup> *Ibidem*.

As one of the most recent cases in the WTO, this dispute is remarkable in several ways. On the one hand, it is the first dispute where the EU has challenged China in the WTO alone. Before that, all EU cases against China were initiated together with other members. On the other hand, it's also the first antidumping case brought by the EU or any other WTO members against China. Interestingly China, the most frequent target of antidumping and other trade remedy measures by the EU and other WTO members, is launching more antidumping proceedings against other WTO members. Are these the '*corresponding measures*' meant by Article 56 mentioned above? In this author's view, the legality of Article 56 will depend above all on the characterisation, of course by the panel and the Appellate Body, of the provision as '*mandatory*' or '*discretionary*' legislation.<sup>30</sup>

### 3. WTO Cases Initiated by China against the EU

China has initiated complaints against the EU in two WTO cases so far.

#### 3.1. EC-Antidumping Measures on Certain Iron or Steel Fasteners from China (DS397, 2009)

On 31 July 2009, China requested consultations with the EC concerning various antidumping measures on certain iron or steel fasteners from China, including: (i) Article 9(5) of Council Regulation (EC) No. 384/96 (the EC's Basic Anti-Dumping Regulation), which provides that in case of imports from non-market economy countries, the duty shall be specified for the supplying country concerned and not for each supplier and that an individual duty will only be specified for exporters that demonstrate that they fulfil the criteria listed in that provision; (ii) Council Regulation (EC) No 91/2009 of 26 January 2009, which imposed a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in China.<sup>31</sup> According to China, the challenged rule of the Basic Anti-Dumping Regulation and the imposition of an anti-dumping duty are inconsistent, as such, with the EC's obligations under various provisions of the Anti-Dumping Agreement (*inter alia*, those regarding the scope of the like product, the extent of the domestic industry, the conduct

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<sup>30</sup> For an discussion of the mandatory and discretionary legislation distinction under WTO law, see: S. Bhuiyan, *Mandatory and Discretionary Legislation: the Continued Relevance of the Distinction under the WTO*, "Journal of International Economic Law" Vol. 5, No. 3/2002, p. 571–604.

<sup>31</sup> *European Communities – Definitive Anti-dumping Measures on Certain Iron or Steel Fasteners from China – Request for Consultations by China*, WT/DS397/1, 04.08.2009.

of an injury analysis, and the lack of price comparability adjustments made in the calculation of the anti-dumping margin), the GATT 1994, and the WTO Agreement.<sup>32</sup>

With the failure of the consultation, a panel was established by the DSB on 23 October 2009 at the request of China. The panel expects to complete its work in September 2010.

The dispute is noteworthy in that it relates to China's (non) market economy status in the WTO. Although the Anti-Dumping Agreement or other WTO legal texts did not even contain the term '*non-market economy*' (NME), at least in practice many WTO members use a discriminatory methodology in determining the dumping margin of exporters from a NME, e.g. by substituting the domestic prices of an allegedly NME country with the prices of a predetermined market economy of a third country in calculating the '*normal value*' of the products under investigation.<sup>33</sup> According to Article 15 (Price Comparability in Determining Subsidies and Dumping) of China's Accession Protocol, in order to determine price comparability in an antidumping investigation against imports from China, the importing WTO member '*may use a methodology that is not based on a strict comparison with domestic prices or costs in China*' unless '*the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product*'.<sup>34</sup> In recent years China has consistently asked its major trade partners such as the EC, US and Japan to explicitly grant market-economy status to it, but so far it has not succeeded.<sup>35</sup> In the case of the EC, while its Basic Anti-Dumping Regulation requires that individual dumping margins be calculated for individual exporters, Article 9(5) of the same Regulation allows the imposition of country-wide dumping duties on producers in NME countries such as China. As the investigating authorities of the importing country are endowed, under WTO law, with wide discretion, both in determining the NME status and in most procedural aspects of

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<sup>32</sup> Ibidem.

<sup>33</sup> One possible argument is that such discriminatory practice derives from the mandate of Article 2 of the Anti-Dumping Agreement, which foresees the possibility that '*the particular market situation*' of the exporting country may render a proper price comparison difficult. For an overview of the relevant legal issues, as well as the domestic rules of some WTO members see C. Sohn, *Treatment of Non-market Economy Countries under the World Trade Organisation Anti-dumping Regime*, "Journal of World Trade" Vol. 39, No. 4 /2005, p. 763-786.

<sup>34</sup> This provision shall expire 15 years after the date of accession, i.e. by 2016.

<sup>35</sup> Near 100 countries have recognised China's market economy status, but most of them are small countries, see: <http://gcontent.nddaily.com/b/b1/bb1662b7c5f22a0f/Blog/486/a580d3.html>

the antidumping proceedings, the extent to which China's challenge to the EU legislation will be successful remains to be seen.<sup>36</sup>

### **3.2. EU-Anti-Dumping Measures on Certain Footwear from China (DS405, 2010)**

On 4 February 2010, China requested consultations with the EU concerning its anti-dumping measures on certain leather footwear from China. In particular, China challenged, *inter alia*, the following as inconsistent with the WTO: the Basic EC Anti-Dumping Regulation, which provides that, in case of imports from NME countries, the anti-dumping duty shall be specified for the supplying country concerned and not for each individual supplier, unless they can demonstrate that they fulfil the criteria set forth in its Market Economy Treatment and Individual Treatment rules. According to China, applicable WTO rules require that an individual margin and duty be determined and specified for each known exporter and producer, and not for the supplying country as a whole. China considers that the measures in question are inconsistent with the EU obligations under various provisions of the WTO Agreement, China's Accession Protocol, Anti-Dumping Agreement, and the GATT 1994.<sup>37</sup>

At the request of China, a panel was established by the DSB on 18 May 2010. Most likely, the panel will not be able to release its report until the first half of 2011.

The merits of this dispute are closely related to that of the previous dispute, i.e. DS397. A further background to the dispute is that, unlike earlier 'precedents' since China joined the WTO in 2001, in the footwear case and other recent EU antidumping proceedings, all applications from Chinese exporters for 'partial' market economy status and individual treatment have been rejected without exception, to China's apparent annoyance.<sup>38</sup> But again, considering the wide discretion of the anti-dumping authorities under WTO law, the result of the challenge remains to be seen.

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<sup>36</sup> Citing the interim report of the Panel, which is not yet released to the public, a recent report by the Financial Times says that '*in a notable victory for China*', the way the EU imposes antidumping duties, particularly its practice of imposing a single national blanket on imports, was found to be in violation of WTO rules. See: S. Pignal, *Trade Rebuke for Europe Breaking Global Trade Rules*, available at <http://www.ftchinese.com/story/001034062/en>.

<sup>37</sup> *European Union – Anti-Dumping Measures on Certain Footwear from China – Request for Consultations by China*, WT/DS405/1, 08.02.2010.

<sup>38</sup> L. Ruessmann, A. Willems, and C. Dacko, *Market Economy Treatment in the Footwear case: Tackling Unfair Competition Unfairly?*, "International Trade Law & Regulation" Vol. 15, No. 4/2009, p. 105–118.

**4. Some Preliminary Analysis**

In terms of absolute numbers, WTO trade disputes between the EU and China have so far been limited.<sup>39</sup> As regards China, it has been involved, either as complainant or as respondent, in 25 cases since 2002. Of the seven cases in which China has initiated complaints, only two have been against the EU, while the other five were all against the US. On the other hand, of the 18 cases against China, only four were initiated by the EC, in contrast to eight by the US, three by Mexico, two by Canada and one by Guatemala.

As to the EU, it has been involved in 152 trade disputes since 1995. Only four of the 82 cases in which the EU has initiated complaints have been against China, while only two of the 70 cases against the EU were initiated by China.

However, if one looks at the statistics of recent years, the scenario looks quite different. Since 2007, WTO trade disputes involving China in general, and those with the EU in particular, have increased significantly. Of the 55 disputes in the period 2007–2010, the EU and China both complained in six cases and responded in 14. Tables 2 and 3 show that since 2007, China has become the largest target of the EU and is also among the largest initiators of cases against the EU. Tables 4 and 5 show that the EU is China’s second largest target and is also the second largest sponsor of cases against China. Tables 6 and 7 show that for both EU and China, since 2007 disputes involving the other party (either as complainant or as respondent) constitute a significant portion of the total (5 out of 20 for both sides). Furthermore, the same two tables show that during 2007–2010 China is the EU’s largest ‘dispute partner’ and the EU is China’s second largest after the US, whereas China is the EU’s second largest trading partner and the EU is China’s largest trading partner.

**Table 2. Targets of the 6 Cases Brought by EU, 2007–2010**

rank	Member	number
1	<b>China</b>	<b>3</b> (DS 372/395/407)
2	India/Philippines /Thailand	1 each

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<sup>39</sup> As of 29.08.2010, 411 cases have been brought to the WTO. A chronological list of all WTO disputes cases, as well as a table of disputes by member state, can be found at: [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm). Unless otherwise indicated, all statistics used in this part are calculated by the author based on the list and table therein.

**Table 3. Initiators of the 14 Cases against the EU, 2007–2010**

Rank	member	number of cases
1	<b>China</b> /Canada/India/USA	<b>2</b> each (DS397/405 for China)
2	Brazil/Columbia/Japan/Norway/ Panama/Chinese Taipei	1 each

**Table 4. Targets of the 6 Cases Brought by China, 2007–2010**

Rank	member	number of cases
1	USA	4
2	<b>EU</b>	<b>2</b>

**Table 5. Initiators of the 14 Cases against China, 2007–2010**

Rank	member	number of cases
1	USA	6
2	<b>EU</b> /Mexico	<b>3</b> each (DS372/395/407 for the EU)
3	Canada/Guatemala	1 each

**Table 6. Rank of WTO members having disputes with the EU, 2007–2010**

Rank	member	number of cases
	Total	20
1	<b>China</b>	<b>5</b> (DS372/395/397/405/407)
2	India	3
3	USA/Canada	2 each
4	Brazil/Columbia/Japan/ Norway/Panama/Chinese Taipei/Philippines /Thailand	1 each

**Table 7. Rank of WTO members having disputes with China, 2007–2010**

Rank	member	number of cases
	Total	20
1	US	10
2	<b>EU</b>	<b>5</b> (DS372/395/397/405/407)
3	Mexico	3
4	Canada/Guatemala	1 each

Next it may be helpful to compare China's WTO disputes with the EU and the USA respectively, as they are the two most important trading partners of China. Table 7 shows that China had many more cases with the USA than with the EU, even though its trade volume with the latter is larger than the former.<sup>40</sup> A quick explanation is that the trade policy of the USA is more aggressive than that of the EU.<sup>41</sup> However, despite the smaller number of cases, there seems to be what can be described as a 'rising trend' in the trade disputes between China and EU: of all the four cases the EU initiated against China, three were launched in the most recent three years (2008, 2009 and 2010), which equals the number of cases initiated by the USA against China during the same time period; of the two cases China initiated against the EU, both have been launched in the last two years (2009 and 2010), and that also equals the number of cases initiated by China against the USA during the same time period. This comparison seems to suggest that the EU is quickly 'catching up' as China's largest 'dispute partner'. But what are the reasons behind this development?

For one thing, one may observe that China, as it gains experience and confidence in the dispute settlement system of the WTO, is now shifting its role from a conciliatory defendant and reluctant complainant to a proponent of 'aggressive legalism'.<sup>42</sup> And as China trades the most with the EU and US, it's only natural that China has more 'vested interests' in settling trade disputes with the two trading partners in the framework of the WTO. In addition, after the early years of China's WTO membership, its major trading part-

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<sup>40</sup> According to the China Customs data, the bilateral trade between China and the US amounted to 298.26 billion US dollars in 2009, while the volume of bilateral trade between China and the EU in 2009 amounted to 364.09 billion US dollars. See: Ministry of Commerce of the People's Republic of China, *Foreign Market Access Report 2010*, available at <http://gpj.mofcom.gov.cn/aarticle/d/cw/201004/20100406869158.html>

<sup>41</sup> This is evidenced by the fact that the USA, the second largest economy of the world, had more WTO cases (94 cases as complainant and 110 cases as respondent) than the EU (82 cases as complainant and 70 cases as respondent), the largest economy. See: [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/org6\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm). And it has been noted that dispute initiation under GATT/WTO is subject to positive feedback—defendants often file what might loosely be called 'countersuits'. See: M.L. Busch, E. Reinhardt, *Testing International Trade Law: Empirical Studies of GATT/WTO Dispute Settlement in The Political Economy of International Trade Law: Essays in Honor of Robert E. Hudec*, eds. D.L.M. Kennedy, J.D. Southwick, Cambridge 2002, p. 464.

<sup>42</sup> See: M. Harpaz, *Sense and Sensibilities of China and WTO Dispute Settlement*, Hebrew University International Law Research Paper, No. 02/10, May 2010, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1599563](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1599563); H. Gao, *China's Participation in the WTO: A Lawyer's Perspective*, "Singapore Year Book of International Law" Vol. 11/2007, p. 1–34. Notably, China never accepted any binding third party dispute settlement in the half century between 1949 and 2000, i.e. before China joined the WTO in 2001. See: M. Harpaz, op.cit.



ners have become less tolerant to Chinese 'misbehaviour',<sup>43</sup> and this change of attitude is especially evident in the case of the EU.<sup>44</sup>

Lastly, in terms of subject matter, the four cases brought by the EU against China have been focused on different sectors and issues: DS339 and DS372 dealt with market access for goods (auto-parts) and services (financial information) respectively, while DS395 and DS407 dealt with export restrictions (or access to raw materials) and trade remedy measures (antidumping) respectively. By and large, these subject matters show that the EU is very much concerned about China's market opening to foreign companies, as well as undue governmental intervention in the market.<sup>45</sup> On the other hand, China's two complaints against EU both relates to antidumping measures (similar to its complaints against the USA). This reality reflects the fact that China, whose comparative advantage is in labor-intensive manufactures, is vulnerable to the trade remedy measures by major trading partners such as the EU and USA.<sup>46</sup> In the coming years, this will continue to be China's top concern in its trade relations with the EU, and more cases on this subject can be anticipated.

## 5. Conclusions and Prospects

With market power come trade disputes. As two of the major economic and trade powers in the world today, the EU and China have used the dispute settlement system of the WTO to solve bilateral trade disputes on various occasions, which now constitute an integral part of the overall EU-China

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<sup>43</sup> From an oral discussion of a senior official from the Chinese Ministry of Commerce during the annual meeting of Chinese Society of International Law, held on 16–17.07.2010 in Beijing. H. Gao predicted the casual relationship between Western Countries' WTO litigations against China and the latter's shift to aggressive legalism when he asserted that '*an over-aggressive litigation strategy against China in the WTO might be the victim of its own success: if the WTO dispute settlement system is used too frequently, it might just turn itself into a catalyst for change in China's litigation strategy at some point*'. See: H. Gao, op.cit., p. 33.

<sup>44</sup> But it should be noted that in recent years, there are signs of caution in terms of the deterioration in the bilateral political relations (e.g. the conflicts during the torch relay of the 2008 Olympic Games in Paris and London, and disagreement on such sensitive issues as the future of Tibet). Although there's no evidence as to the linkage between the political relationship and increased trade disputes, most likely decreased mutual trust will lead to more conflicts in other areas.

<sup>45</sup> See: *European Union Opening Statement: Trade Policy Review of China*, 31.05.2010, Geneva, [http://trade.ec.europa.eu/doclib/docs/2010/june/tradoc\\_146211.pdf](http://trade.ec.europa.eu/doclib/docs/2010/june/tradoc_146211.pdf).

<sup>46</sup> For an overview of EU/EC trade remedy cases against China from 1979 to March 2010, see <http://gpj.mofcom.gov.cn/aarticle/d/e/f/h/201004/20100406853972.html>. Similarly, four (DS252/368/379/399) of the five cases brought by China against the USA focused on trade remedy measures (antidumping, countervailing duties, and safeguards). See: [http://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm).

economic and trade relationship. Those ‘initial experiences’ not only mirror the reality today, but also shed important light on the future bilateral trade relationship, and especially the two sides’ current and future concerns on trade remedy measures and NME status (from the Chinese side), market opening, access to raw materials, etc (from the EU side).

As was mentioned earlier, in terms of absolute number, WTO disputes between the EU and China are still limited. Overall, the two sides have refrained from being very aggressive in initiating WTO cases against each other. However, the last three or so years have witnessed a substantial increase in trade disputes between the EU and China. Although it’s still too early to clearly identify the reasons behind this development, should that trend continue in the coming years one should be cautious in assessing the potential negative impact. Dispute settlement is first of all a process of ‘problem-solving’, but improper dispute settlement (including misuse of the dispute settlement system of the WTO) could also be ‘problem-creating’.<sup>47</sup> This is particularly the case for those recent trade disputes by western powers targeted against China, which can be somehow traced back to differences in political systems and ideology, e.g. the cultural products dispute complained by the US (DS 363) in 2007, the financial information dispute complained by the EU, US and Canada (DS 372/373/378), and a potential complaint by the US concerning Google’s supply of internet browser service in China.<sup>48</sup> Even if one agrees with Henry Gao in his argument that *‘the major advantage of aggressive legalism is that it turns cross-border disputes from a difficult political, trade or diplomatic issue that might undermine the bilateral relationships of the countries involved into a legal issue that is embroiled in an intricate legal game’*,<sup>49</sup> at least from the trade perspective an increase in disputes of that sort is likely to threaten China’s continued cooperation and engagement in the WTO. In summary, the way EU-China trade disputes in the WTO are managed will have far-reaching implications, not only for the mutual relationship of the two key global players, but also for the global economy and the multilateral trading system as a whole.

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<sup>47</sup> Article 3 of the DSU emphasises that *‘[t]he aim of the (WTO) dispute settlement mechanism is to secure a positive solution to a dispute’*, and *‘[t]he prompt settlement of situations... is essential to the effective functioning of the WTO and the maintenance of a proper balance between the rights and obligations of Members’*; thus, *‘recommendations or rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this Understanding and under the covered agreements’*.

<sup>48</sup> For a brief overview of the ‘Google incident’ and its roots in human rights issues, see: D. Currsey, *US May Use WTO to Resolve Google-China Dispute; Obama Administration to Help Google in Censorship Battle*, available at <http://news.techworld.com/networking/3214222/us-may-use-wto-to-resolve-google-china-dispute/?olo=rss>

<sup>49</sup> See H. Gao, *op.cit.*, p. 33.

