

“WTO-Plus” Obligations and Their Implications for the World Trade Organization Legal System

An Appraisal of the China Accession Protocol

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The accession of the People’s Republic of China to the World Trade Organization in December 2001 marked one of the most significant events in the history of the world trading system. The long-awaited accession—15 years in the making—has generated considerable professional and scholarly comment. Much of the analysis has focused on the potential impact of the accession on the world economy and on China. This article has a different purpose: it seeks to explore the implications of China’s accession for the WTO legal system.

The Protocol on the Accession of the People’s Republic of China¹ (hereafter the China Protocol or the Protocol) is a unique agreement within the WTO legal framework. Unlike any other WTO protocol of accession, the China Protocol is not a standardized document. Instead, it contains a large number of special provisions that elaborate, expand, modify or deviate from the existing WTO agreements. As a result, the Protocol has significantly revised WTO rules of conduct when applied to China trade.

This article focuses on one set of the special provisions of the China Protocol: those that prescribe obligations exceeding the existing requirements of the WTO agreements. Such obligations are also known as the “WTO-plus” obligations. Prior to the accession of China, very few WTO-plus obligations existed for the several WTO acceding Members, and their impact on the WTO legal regime was negligible. Due to the China Protocol, the situation has now changed. The WTO-plus obligations undertaken by China are extensive: they cover areas ranging from the administration of China’s trade regime (transparency, judicial review, sub-national governments, and transitional review), to the Chinese economic system (market economy commitments), to new WTO disciplines on investment (investment measures and national treatment of foreign investors). Some of the WTO-plus provisions are highlighted in the text of the Protocol, while others lie buried in obscure provisions of

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¹ WTO, *Protocol on the Accession of the People’s Republic of China*, WT/L/432 (10 November 2001), available at <www.wto.org>.

the Report of the Working Party on the Accession of China² (hereafter the Working Party Report).

Given that the WTO-plus obligations impose more stringent disciplines on China than standard WTO rules, they can be expected to have a positive effect on China trade. However, such obligations also raise a fundamental question for the WTO system: whether the WTO should create “plus” rules on a member-specific basis. The article analyses the potential negative implications of the China-specific plus obligations on the rule structure and dispute settlement procedure of the WTO. It contends that rule-making on a member-specific basis is a legacy of the General Agreement on Tariffs and Trade (GATT) era and is inherently incompatible with the rule-based WTO system.

The article proceeds as follows. Section I introduces the background and analytical framework for the WTO-plus obligations of China. Section II identifies seven categories of such obligations in reference to existing WTO rules. Section III discusses the positive and negative implications of such obligations for the WTO legal system, as well as the unspoken rationale behind their creation. Section IV provides the conclusions of the study and makes several recommendations regarding reform of the WTO accession process.

I. INTRODUCTION

A. THE ANALYTICAL PRISM

The uniqueness of the China Protocol and the implications of the China-specific WTO-plus obligations may be best understood by a close examination through the analytical prism of two important features of WTO law: (1) the distinction between WTO rule obligations and WTO market access obligations; and (2) the uniformity of WTO rules of conduct as opposed to the fragmented rule structure under the system of the General Agreement on Tariffs and Trade (GATT 1947).

1. *WTO Rule Obligations Versus Market Access Obligations*

The obligations of a WTO Member can be divided into two categories: (a) the general obligation to comply with WTO rules of conduct (the rule obligations); and (b) the individual obligation to reduce trade barriers with respect to specific goods and services (the market access obligations). The WTO rules of conduct are set out in the Agreement Establishing the World Trade Organization (the WTO Agreement) and its annexes, including GATT 1994 and its related agreements, the General Agreement on Trade in Services (GATS), the Agreement on Trade-Related Aspects of Intellectual

² WTO, *Report of the Working Party on the Accession of China*, WT/MIN(01)/3 (10 November 2001) (“WPR”), available at <www.wto.org>.

Property Rights (TRIPs) and the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).³ The market access obligations of the Members, on the other hand, are contained in the Members’ goods and services schedules annexed to GATT 1994 and GATS respectively.

The rule obligations and market access obligations of WTO Members differ in their design. The rule obligations of WTO Members are uniform: all WTO Members are, in principle, bound by the same set of rules of conduct under the WTO Agreement.⁴ By contrast, all market access obligations are country-specific, i.e., the obligations of individual Members to liberalize their trade in specific goods and services vary from one to another. The individual market access obligations of each Member are however required to apply to all other Members on the basis of the most-favoured-nation (MFN) treatment.⁵

The rule obligations and market access obligations also differ in the way in which they may be modified or changed. Amendment to any provision of the WTO Agreement or GATT 1994, GATS, TRIPs, DSU and Trade Policy Review Mechanism (collectively the “Multilateral Trade Agreements”⁶) can be made only in accordance with the elaborate and stringent procedures set out in the WTO Agreement.⁷ Consequently, it is very difficult to effect any change to WTO rules.⁸ Market access obligations, however, may be modified, withdrawn or renegotiated, either periodically or under certain specified circumstances at any time, on the basis of reciprocity.⁹ Thus, while market access obligations and rule obligations are both WTO treaty obligations equally binding on its Members, market access obligations are designed to allow flexibility for frequent change whereas rule obligations are intended to be stable and unsusceptible to constant revision.

³ All texts of the WTO Agreements are available at <www.wto.org>.

⁴ Except that the Plurilateral Trade Agreements in Annex 4 of the WTO Agreement apply only to Members that have separately accepted them. See WTO Agreement Article 11:3.

⁵ See GATT Article II:1 and GATS Article II:1.

⁶ Article II:2 of the WTO Agreement.

⁷ See Article X of the WTO Agreement.

⁸ The amending procedures for the WTO agreements “are probably at least as difficult as those that existed under the GATT (largely copied from the GATT, with the possible exception of certain non-substantive procedural amendments). Under the GATT, it was perceived ... that amendment was virtually impossible ...”. John H. Jackson, *The Jurisprudence of GATT and the WTO: Insights on treaty law and economic relations* (Cambridge: Cambridge University Press, 2000), p. 185.

⁹ Both the GATT and the GATS permit a Member to modify or withdraw a concession or a commitment in its Schedules after a period of three years, provided that the modifying Member shall, at the request of affected Members, enter into negotiations with a view to reaching an agreement on any necessary compensatory adjustments so as to maintain a general level of reciprocal and mutually advantageous concessions and commitments no less favourable than that provided for in the Schedules prior to the negotiation. See GATT Article XXVIII:1 and GATS Article XXI. Additionally, tariff bindings on goods can be renegotiated at any time under GATT Articles XXVIII:4 (special circumstances), XXVIII:5 (reserved re-negotiation rights), XVIII:7 (developing countries), and XXIV:6 (compensatory renegotiations due to formation of a customs union or free trade area). Also, specific market access obligations are subject to change in a new round of multilateral trade negotiations.

2. *Uniformity of WTO Rules of Conduct Versus GATT à la Carte*

The uniformity of WTO rules of conduct is regarded as one of the major achievements of the Uruguay Round.¹⁰ For historical reasons, GATT as an institution had maintained a somewhat “fragmented” rule structure under which the rule obligations of the contracting parties could differ. Thanks to the “grandfather clause” of the Protocol of Provisional Application and of the GATT protocols of accession, each GATT contracting party was obligated to apply Part II of GATT 1947 only to the fullest extent not inconsistent with its existing legislation.¹¹ A country acceding to GATT might be subject to special rules contained in its protocol of accession that would prevail over the provisions of GATT.¹² More significantly, a number of implementing agreements negotiated in the Tokyo Round applied only to the contracting parties that opted to abide by them.¹³ As a result of this “GATT à la carte” approach, the GATT rule structure became notoriously complex and confusing, which only worked to compromise the integrity and effectiveness of the multilateral trading system.

The Uruguay Round took a decisive step to end the fragmentation of the multilateral trading rules. Pursuant to the “single package understanding” on the application of the WTO agreements, no individual reservation may be made under the WTO Agreement;¹⁴ and GATT 1947 was replaced by GATT 1994 to provide a uniform application of GATT to all Members.¹⁵ Furthermore, Article II:2 of the WTO Agreement explicitly provides that the agreements and associated legal instruments included in the Multilateral Trade Agreements “are integral parts of this Agreement, binding on all Members”. Thus, for the first time in history the

¹⁰ See, generally, Ernst-Ulrich Petersmann, “International Trade Law and the GATT/WTO Dispute Settlement System 1948–1996: An Introduction”, in Ernst-Ulrich Petersmann (ed.), *International Trade Law and the GATT/WTO Dispute Settlement System* (London: Kluwer Law International, 1997), pp. 10–15.

¹¹ See, generally, John H. Jackson, *The World Trading System: Law and Policy of International Economic Relations*, 2nd edn (Cambridge, MA: MIT Press, 1997), pp. 39–41.

¹² Pursuant to GATT Article XXXIII, a qualifying government may accede to the GATT “on terms to be agreed between such government and the CONTRACTING PARTIES”. Although most of the GATT protocols of accession had similar texts, some contained special provisions. For example, the protocols of accession of Poland, Romania and Hungary each set out special rules catering to the centrally-planned economic system of the countries. See *Basic Instruments and Selected Documents* (“BISD”), 15S/46, 18S/5, and 20S/3. The accession protocols of Switzerland, the Philippines, Thailand, Egypt and Costa Rica contained special reservations. See GATT, *Analytical Index, Guide to GATT Law and Practice*, 6th edn (Geneva: GATT, 1994) (hereinafter “Analytical Index”), Article XXXIII, p. 948.

¹³ The Tokyo Round produced nine side agreements or “codes” that were stand-alone treaties and only obligated those that signed and accepted them. As Jackson notes, “the development of side codes, or stand-alone ancillary treaties, to enlarge and elaborate the GATT rules, posed technical, legal and administrative difficulties” for the world trading system, and the complexity in the relationship between the codes and the GATT would “hurt those countries that cannot devote additional governmental expertise to GATT representation”, “give rise to a variety of legal disputes among GATT parties” and “contribute to the belief that the richer nations can control and can manipulate the GATT system for their own advantage”. Jackson, as note 11 above, at 71–72.

¹⁴ Article XVI:5 of the WTO Agreement provides: “No reservations may be made in respect of any provision of this Agreement. Reservations in respect of any of the provisions of the Multilateral Trade Agreements may only be made to the extent provided for in those Agreements.”

¹⁵ GATT 1994 incorporates the provisions of GATT 1947, as amended, and the GATT protocols of accession, but expressly excludes the Protocol of Provisional Application and the “grandfather clause” of the protocols of accession. See Article 1 of GATT 1994.

multilateral trading system has established a unified set of rules of conduct under the WTO Agreement.

B. EMERGENCE OF “WTO-PLUS” OBLIGATIONS

1. *A Loophole in the System: Article XII of the WTO Agreement*

Under the unified structure of the WTO Agreement, the rule obligations of the acceding Member should, in principle, be the same as those of the existing Members. The specific provision of the WTO Agreement on accession, however, opens the door for a possible departure from that principle. According to Article XII:1 of the WTO Agreement, “Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreement may accede to this Agreement, *on terms to be agreed between it and the WTO*” (emphasis added).

This provision follows closely the language of GATT Article XXXIII. As in GATT accessions, to benefit from the membership in the multilateral trading system a WTO applicant must negotiate its “ticket of entry” in the form of commitments to lower its trade barrier with respect to specific goods and services. The terms of accession therefore consist of primarily the market access obligations of the acceding country. Article XII of the WTO Agreement, however, places no limits on the terms to be agreed between the acceding country and the WTO.¹⁶ Legally, the existing Members are free to negotiate any other terms for the accession of an acceding country, including country-specific rule obligations. The provision of Article XII makes it possible for the WTO to change the existing rules of conduct for a particular acceding Member.

2. *Standardized Form of WTO Protocols of Accession*

Despite the broad mandate of Article XII, subsequent WTO accession practice has shown an effort to preserve the uniformity of the WTO rule structure.¹⁷ Since 1995, 16 countries have acceded to the WTO, of which 11 are transition economies (former centrally-planned economies).¹⁸ Each of the 16 protocols of accession has been

¹⁶ The WTO Secretariat observed, “Perhaps the most striking thing about WTO Article XII is its brevity. It gives no guidance on the ‘terms to be agreed’, these being left to negotiations between the WTO Members and the applicant. Nor does it lay down any procedures to be used for negotiating these terms, these being left to the individual Working Parties to agree. In this, it follows closely the corresponding Article XXXIII of GATT 1947.” WTO Secretariat, *Technical Note on the Accession Process*, WT/ACC/7/Rev.2, 1 November 2000 (hereinafter “Secretariat Note”), p. 8.

¹⁷ The WTO Secretariat, in consultation with WTO Members, has drawn up a set of procedures to be followed in the accession negotiations. See the Secretariat Note, *id.*, pp. 2, 8–9 (citing WT/ACC/1, 4, 5, 8 and 9). Although not legally binding, the procedures serve as a practical guide for WTO accessions and have helped to unify the accession processes.

¹⁸ The 16 countries are Ecuador, Mongolia, Bulgaria, Panama, Kyrgyzstan, Latvia, Estonia, Jordan, Georgia, Croatia, Albania, Oman, Lithuania, Moldova, China, and Chinese Taipei. Information on all WTO accessions since 1995 is available at <www.wto.org/english/thewto_e/acc_e/completeacc_e.htm>.

made by its own provision “an integral part of the WTO Agreement”.¹⁹ Except in the case of China, the main text of each protocol consists of no more than two pages of standardized provisions that address necessary procedural and technical matters of the accession. The use of such standardized text for the protocol of accession suggests that the acceding Member is not subject to a different set of substantive rules from that applicable to the original WTO Members.

3. *Commitments in the Working Party Report: Origin of WTO-Plus Rules*

One of the standardized provisions of the WTO protocol of accession, however, makes reference to particular paragraphs of the WTO working party report on the relevant accession and incorporates them into the protocol. These incorporated provisions of the working party report thereby acquire the same binding force as those set out in the main text of the protocol itself. The content of the incorporated paragraphs of the working party report varies from country to country, but they typically contain specific commitments regarding WTO rules.²⁰ Except in the case of China, these commitment paragraphs are generally of the following types:

- (a) Obligations to abide by existing WTO rules, e.g., a commitment to bring specific national measures into conformity with WTO provisions on the subject in question;
- (b) Obligations relating to transitional periods permitted under the various WTO agreements, e.g., a commitment not to have recourse to specific WTO provisions providing for transitional periods for developing country Members;
- (c) Authorization to depart temporarily from specific WTO rules or from market access commitments contained in the goods schedules; and
- (d) Obligations to abide by rules created by the commitment paragraph and not contained in the Multilateral Trade Agreements. These relate to a commitment to comply with “WTO obligations and other international obligations” of the acceding country, privatization, sub-central governments, government procurement, trade in civil aircraft and publication.²¹

Unlike the first three types, commitment paragraphs of the last kind create obligations for the acceding Members that *exceed* the requirements of the WTO

¹⁹ See the Secretariat Note, Annex 2, as note 16 above, pp. 71–72, setting out the text common to all 12 protocols of accession concluded by then, in which the integration language appears in para. 2 of Part I. The four accession protocols concluded after the Secretariat Note all contain the same integration language as the first 12 protocols. See WT/ACC/LTU/54 (Lithuania), WT/ACC/MOL/40 (Moldova), WT/L/432 (China), and WT/L/433 (Chinese Taipei), available at <www.wto.org/english/thewto_e/acc_e/completeacc_e.htm>.

²⁰ See the Secretariat Note, Annex 3, *id.*, pp. 75–135, reproducing the commitments undertaken in the accessions of the 12 governments; the accession protocols of Lithuania, Moldova and Chinese Taipei, as note 19 above; and the accession working party reports for Lithuania, WT/ACC/LTU/52, Moldova, WT/ACC/MOL/37, and Chinese Taipei, WT/MIN(01)/4.

²¹ The Secretariat Note, as note 16 above, pp. 22, 73–74, based on an analysis of the accession protocols of 12 governments, including ten transition economies, that had acceded to the WTO before China.

Multilateral Trade Agreements. Such obligations have become known as “WTO-plus” obligations.²² The most extensive of such WTO-plus obligations appear to be the commitments regarding accession to the Agreement on Government Procurement (a WTO plurilateral agreement),²³ and the commitments of transition economies to continue to provide information on their privatization programmes.²⁴

Prior to China’s accession, a number of WTO Members had expressed concern over the creation of “WTO-plus” obligations through accession.²⁵ Some commented that requiring an acceding government to undertake more stringent obligations than present Members was an abuse of economic power and warned that the WTO should take care not to introduce two classes of Members. Others, however, felt there was no easy answer to the question of “WTO-plus”, as Members were still adding to their commitments under the WTO and some order of reciprocity was applicable.²⁶

C. THE CHINA ACCESSION PROTOCOL: A UNIQUE DOCUMENT IN THE WTO TREATY STRUCTURE

Unlike any other WTO protocol of accession, the China Protocol is not a standardized document. It consists of a main text of 11 pages, nine annexes (including China’s Goods and Services Schedules), and 143 paragraphs incorporated by reference from the Working Party Report.²⁷ The main text of the Protocol has 17 sections of substantive provisions (including 56 paragraphs and many additional subparagraphs).²⁸ Most of the 143 paragraphs of the Working Party Report incorporated into the Protocol contain commitments on rules. Thus, covering a wide range of subjects, the China Protocol prescribes a set of special rules to be applied between China and other WTO Members.

The special provisions of the China Protocol can be divided into the following three categories:

²² See *ibid.*, p. 6.

²³ Of the 15 acceding Members (not counting China), 14 undertook to accede or initiate negotiations for accession to the Agreement on Government Procurement. Ten of these Members also undertook to accede to the Civil Aircraft Agreement. See the Secretariat Note, as note 16 above, pp. 122–124, 126–127, and the respective working party reports for Lithuania (paras 140, 157), Moldova (paras 150, 153) and Chinese Taipei (paras 166, 223), as note 20 above.

²⁴ All ten transition economies (excluding China) plus Chinese Taipei made such commitments. See the Secretariat Note, as note 16 above, pp. 75–78, and the respective working party reports for Lithuania (para. 19), Moldova (para. 30), and Taipei (para. 155), as note 16 above.

²⁵ See the Secretariat Note, as note 16 above, pp. 6–7 (summarizing Members’ comments on the terms of accession during the Ministerial Conferences in Singapore in December 1996 and in Geneva in May 1998).

²⁶ *Id.*

²⁷ The Working Party Report has a total of 343 paragraphs. See WPR para. 342 (enumerating 143 paragraphs to be incorporated into the Protocol) and Section 1.2 of the Protocol (incorporating WPR para. 342).

²⁸ These sections include: *Administration of the Trade Regime* (Section 2); *Non-discrimination* (Section 3); *Special Trade Arrangements* (Section 4); *Right to Trade* (Section 5); *State Trading* (Section 6); *Non-Tariff Measures* (Section 7); *Import and Export Licensing* (Section 8); *Price Control* (Section 9); *Subsidies* (Section 10); *Taxes and Charges Levied on Imports and Exports* (Section 11); *Agriculture* (Section 12); *Technical Barriers to Trade* (Section 13); *Sanitary and Phytosanitary Measures* (Section 14); *Price Comparability in Determining Subsidies and Dumping* (Section 15); *Transitional Product-Specific Safeguard Mechanism* (Section 16); *Reservations by WTO Members* (Section 17); and *Transitional Review Mechanism* (Section 18).

- (1) *Commitments on rules within the scope of the Multilateral Trade Agreements.* Such commitments include affirmation that China shall comply with existing WTO rules on specific subjects²⁹ and agreement that China shall not have recourse to certain WTO provisions that provide transitional periods for the developing country Members under the Multilateral Trade Agreements.³⁰ A large number of the Protocol provisions (including many incorporated from the Working Party Report) fall under this category.
- (2) *Commitments on “WTO-plus” obligations.* These are provisions that impose more stringent disciplines on China than required by the Multilateral Trade Agreements. Such WTO-plus rules cover subjects ranging from transparency, judicial review, sub-national government, to foreign investment, national treatment of foreign investors, economic reform, government procurement, and compliance review.
- (3) *Commitments on rules that result in “WTO-minus” disciplines and rights.* These are the special rules of conduct that at once weaken the existing WTO disciplines and reduce the rights of China as a WTO Member. Such rules concern primarily trade remedies, i.e., antidumping, anti-subsidy and safeguard measures.³¹ These rules either modify, deviate from, or are without a clear basis in, the existing rules and principles of the Multilateral Trade Agreements. While the special rules on antidumping and safeguard measures have limited periods of application,³² the provisions on special subsidy rules are made a permanent part of China’s WTO membership.

The provisions in the first category do not change the existing WTO rules of conduct, although some of them may have the effect of elaborating and interpreting specific WTO rules.³³ In contrast, the provisions in the second category expand WTO rules of conduct, and those in the third category revise the existing WTO rules on trade remedies when applied to China. Many of the WTO-plus provisions and all of the “minus” provisions are unique to the China Protocol. Thus, the Protocol has

²⁹ E.g., Section 11 of the Protocol requires China to ensure that customs fees or charges, and internal taxes and charges, applied or administered by national or sub-national authorities “shall be in conformity with the GATT 1994”. Section 13.2 of the Protocol requires China to “bring into conformity with the TBT Agreement all technical regulations, standards and conformity assessment procedures” upon accession.

³⁰ E.g., China undertakes to eliminate all export subsidies upon accession, thereby foregoing the right it may otherwise enjoy under Article 27.2(b) of the Agreement on Subsidies and Countervailing Measures (the SCM Agreement), which permits developing country Members to delay such elimination until 1 January 2003. See Section 10.3 of the Protocol. Additionally, China has undertaken not to invoke Articles 27.8, 27.9 and 27.13 of the SCM Agreement, which grant certain special treatment to developing country Members. See WPR paras 171–174, which were incorporated into the Protocol.

³¹ See the Protocol, Sections 10.2 (specificity test), 15 (dumping and subsidies) and 16 (product-specific safeguards); and WPR, para. 242 (transitional textile safeguard mechanism), which was incorporated into the Protocol.

³² The special anti-dumping provisions will expire 15 years after the date of China’s accession, the special product-specific safeguard will expire 12 years after the accession, and the transitional textile safeguard mechanism will expire on 1 January 2009. Id.

³³ It is unclear what legal effect of such provisions of the accession protocols may have on the interpretation of relevant WTO provisions. For significance of WTO accession working party reports in interpretation of WTO agreements, see Michael Lennard, *Navigating by the Stars: Interpreting the WTO Agreements*, 5 J.I.E.L. 17 (2002), 26.

created a new set of rules of conduct within the WTO treaty structure to govern all WTO trade with the sixth largest trading power in the world.³⁴

The creation of China-specific rules of conduct raises many questions for the WTO system, and its potentially profound impact on the multilateral trading system is to be observed in the years to come. A comprehensive study of the topic, however, is beyond the scope of this article. Instead, this study will focus only on the WTO-plus obligations of China and their implications for the WTO legal system.

II. “WTO-PLUS” OBLIGATIONS OF CHINA

The major WTO-plus obligations undertaken by the Chinese government concern the following areas: (1) transparency, (2) judicial review, (3) uniform administration, (4) national treatment, (5) foreign investment, (6) market economy, and (7) transitional review. In addition, China has made certain commitments regarding the two plurilateral agreements, especially the Agreement on Government Procurement, although no specific date was set for initiating negotiations for its accession.³⁵

A. TRANSPARENCY

Transparency is one of the basic values of the WTO system—open markets require transparent rules and procedures.³⁶ Each of the GATT, GATS, TRIPs and various other WTO agreements contain provisions regarding transparency of Members’ domestic systems.³⁷ Under these provisions, WTO Members are obligated to: (i) publish all laws, regulations, international agreements, judicial decisions, administrative rulings and other measures of general application affecting imports and exports before they are implemented or enforced and promptly in such a manner as to enable governments and traders to become acquainted with them, and (ii) notify the

³⁴ For year 2001 China ranked as the sixth largest exporter and importer in world merchandise trade, after the United States, Germany, Japan, France, and United Kingdom (and was the fourth largest importer and exporter when EU was counted as one unit). The value of its exports accounted for 4.3 percent, and its imports 3.8 percent, of the world total. For world trade in commercial services in 2001, China ranked as the 12th largest in exportation and 10th largest in importation. Source: *WTO Statistics: International Trade Statistics 2002*, available at <www.wto.org>.

³⁵ See WPR, paras 339, 341, regarding China’s intention to accede to the Agreement on Government Procurement (“GPA”) and the steps China agreed to take to comply with the GPA before its accession. China has become an observer to the GPA after its accession to the WTO. See also WPR, para. 240 for China’s limited commitment regarding trade in civil aircraft. All these paragraphs were incorporated into the Protocol.

³⁶ Meinhard Hilf, *Power, Rules and Principles—Which Orientation for WTO/GATT Law?*, 4 J.I.E.L. (2001) 111, at 119, indicating that transparency as a broad concept could refer to at least three different contexts: the internal legal regime of WTO Members, the procedures conducted by WTO institutions, and the WTO dispute settlement process.

³⁷ See e.g., GATT Article X; GATS Article III; TRIPs Article 63; Agreement on Technical Barriers to Trade (the TBT Agreement) Articles 2 and 10; Agreement on the Application of Sanitary and Phytosanitary Measures (the SPS Agreement) Article 7 and Annex B; the SCM Agreement, Part VII; Agreement on Safeguards, Article 12; and Agreement on Trade-Related Investment Measures (TRIMs) Article 6.

WTO and/or other Members of any change in such laws, regulations, decisions, rulings and measures.

The China Protocol contains one subsection and several commitment paragraphs of the Working Party Report devoted to the subject of transparency.³⁸ China's major undertakings on transparency concern publication of laws and regulations. Specifically, the Protocol requires the Chinese government to:

- (a) enforce only those laws, regulations and measures affecting trade that are published and readily available to the public;
- (b) publish all laws, regulations and other measures affecting trade before they are implemented or enforced;
- (c) designate an official journal dedicated to such publication, publish such journal on a regular basis and make copies of all issues of such journal available to individuals and enterprises;
- (d) establish one or more enquiry points where any individual, enterprise or WTO Member may obtain all information regarding the measures subject to publication;
- (e) reply to requests for information within 30 days (45 days in exceptional cases) after receipt of a request and notify in writing any delay and reasons for the delay to the interested party; the replies to WTO Members must be complete and represent the authoritative view of the Chinese government, and information provided to individuals and enterprises must be accurate and reliable;
- (f) provide a reasonable period for comment to appropriate authorities on all such laws, regulations and measures after they are published in the dedicated journal but before they are implemented (except for those laws and regulations involving national security, specific measures setting foreign exchange rates or monetary policy and other measures the publication of which would impede law enforcement); and
- (g) translate all laws, regulations and other measures pertaining to trade into at least one official language of the WTO and to make such translations available to WTO Members no later than 90 days after their implementation or enforcement.³⁹

While the obligations described in (a) through (d) above mostly confirm or elaborate existing WTO rules, the requirements in (e), (f) and (g) are clearly not contained in any of the WTO agreements. These WTO-plus rules are further discussed below.

³⁸ See Section 2(C) of the Protocol and WPR paras 324–336, of which paras 331–334, 336 were incorporated into the Protocol. Additionally, Section 6.1 of the Protocol requires China to ensure that the import purchasing procedures of state trading enterprises are fully transparent.

³⁹ See Section 2(C) of the Protocol and WPR para. 334.

1. *Obligation to Seek Public Comment on Laws and Regulations*

A WTO Member does not have a general obligation to seek public comment on all of its proposed trade laws and regulations. Under existing WTO rules, only in certain specifically defined circumstances is a WTO Member obliged to solicit comments from other Members on its proposed regulation. For instance, the Agreement on Technical Barriers to Trade requires a Member to provide reasonable time for other Members to make written comments, discuss such comments upon request, and take into account such comments on its proposed technical regulation, if (i) a relevant international standard does not exist or the proposed regulation is not in accordance with that of relevant international standards, and (ii) the proposed regulation may have a significant effect on trade of other Members.⁴⁰ Similar requirement exists under the Agreement on the Application of Sanitary and Phytosanitary Measures.⁴¹

In comparison, China has undertaken a general obligation to seek public comment on a broad range of laws and regulations. Specifically, the Protocol requires China to “provide a reasonable period of comment” to the appropriate authorities on “all laws, regulations and other measures pertaining to or affecting trade in goods, services, TRIPs or the control of foreign exchange” before their implementation, except for those laws, regulations and other measures involving national security, setting foreign exchange rates or monetary policy and measures the publication of which would impede law enforcement.⁴² Although the required comment period comes after the publication of such laws and regulations and the relevant authorities are not obligated to take the comments into account, the purpose of this provision is presumably to allow the public an opportunity to influence the published measures before their implementation. Since the comments to be sought are not expressly limited to those of other WTO Members, any private person or entity is also entitled to provide input. To subject such a wide range of Chinese laws and regulations to a mandatory public comment period clearly exceeds the requirements of existing WTO rules.

2. *Obligation to Respond to Information Inquiries*

Under the WTO agreements, a Member has obligation to respond to requests by other Members for information on trade measures only in limited circumstances. Specifically, a Member is required under GATS to respond promptly to all requests by any other Member for specific information on its measures of general application, or on international agreements to which it is a signatory, which pertain to or affect the operation of GATS.⁴³ A Member is also obligated by TRIPs to “be prepared to supply,

⁴⁰ See the TBT Agreement, Article 2.9.

⁴¹ See the SPS Agreement, Annex B, section 5.

⁴² Section 2(C)(2) of the Protocol.

⁴³ GATS Article III:4.

in response to a written request from another Member, information” relating to laws, regulations, final judicial decisions, administrative rulings of general application, and bilateral agreements pertaining to the subject matter of TRIPs.⁴⁴

In comparison, the Protocol requires the Chinese government to respond to requests of “any individual, enterprise or WTO Member” for information relating to any measure pertaining to or affecting “trade in goods, services, TRIPs or the control of foreign exchange”.⁴⁵ The response must be made within a fixed time limit—30 days in general and 45 days in exceptional cases—after receipt of a request; any delay in response to an inquiry and the reasons for such delay must be notified in writing to the interested party. Furthermore, the response has to be of a certain quality: replies to WTO Members must be “complete” and “authoritative” and replies to individuals and enterprises “accurate and reliable”. Obviously, these provisions impose on China obligations that are much broader in scope and much more stringent in content than currently required of any other WTO Member. It is particularly worth noting that such obligations of China are undertaken not only towards other WTO Members, but also “any individuals and enterprises”.

3. *Obligation to Make Foreign Language Translations*

There is no existing WTO rule that requires a Member whose official language is not English, French or Spanish to be responsible for translating all of its laws, regulations and measures pertaining to trade into one of the three official languages of the WTO, let alone an obligation to make such translation available within 90 days of their implementation or enforcement. This extraordinary obligation is set out in paragraph 334 of the Working Party Report and incorporated into the Protocol. Given that hundreds of laws, regulations and measures pertaining to trade may be issued by the Chinese central and local governments each year and that it may take months before the central government can even collect all the relevant local rules and measures,⁴⁶ to translate all such laws, regulations and measures into one of the three foreign languages and to make such translation available to all WTO Members within 90 days of their implementation would seem an extremely burdensome if not an impossible mission for the Chinese government to accomplish.⁴⁷

⁴⁴ TRIPs Article 63.3.

⁴⁵ Section 2(C)(3) of the Protocol.

⁴⁶ A major source of the problem lies in the diffusion of rulemaking power in China. At the national level, more than 20 government bodies have power to make laws, regulations or rules, including the National People's Congress and its Standing Committee, the State Council, and the ministries, commissions and other departments of the State Council. At the local level, the provincial people's congresses and their standing committees and the provincial governments have the power to issue local regulations and rules. See WPR para. 66 for a brief account of the rulemaking structure of China.

⁴⁷ As of the time of this writing, it is unclear whether any single government agency in China has been given the responsibility to co-ordinate all the translations required and where and how such translations may be made available to all WTO Members in a systematic and timely manner.

For years foreign traders and investors have complained about the lack of transparency in the Chinese system. The large size and diversity of the country and the newness of the PRC legal system have often made it difficult for foreign businesses to ascertain the applicable rules in a given situation. The special transparency provisions of the China Protocol were aimed at improving the system to the maximum extent possible. These provisions are also regarded as important for the development of democracy and rule of law in China. In pressing for these norms, however, the special transparency provisions of the Protocol not only far exceed the requirements of the existing WTO rules but also may have prescribed some unrealistic terms that China is almost certain to breach.⁴⁸

B. JUDICIAL REVIEW

The GATT, GATS and TRIPs each contain provisions regarding independent review of administrative decisions of the Members.⁴⁹ Under these provisions, a Member is required to provide the opportunity for objective and impartial review of relevant administrative actions by a judicial or administrative tribunal. To ensure the review is objective and impartial, the tribunal must be independent of the agencies in charge of the administrative actions. A Member, however, is not obligated to institute a review mechanism if it would be inconsistent with its constitutional structure or the nature of its legal system.⁵⁰

Section 2(D) of the Protocol and paragraphs 76 through 79 of the Working Party Report (of which paragraphs 78 and 79 were incorporated into the Protocol) set forth specific obligations of China concerning judicial review. Section 2(D) consists of two parts:

- (a) *Independent tribunals.* China shall establish, or designate, and maintain tribunals, contact points and procedures for the prompt review of all administrative actions relating to the implementation of laws, regulations, judicial decisions and administrative rules of general application referred to in Article X:1 of GATT 1994, Article VI of GATS and the relevant provisions

⁴⁸ According to a recent report by the United States Trade Representative, China has lagged behind in its obligation to provide translations, “in large part because of the extraordinary number of laws and regulations issued during the last year”. United States Trade Representative, *2002 Report to Congress on China’s WTO Compliance* (11 December 2002), p. 48, available at <www.ustr.gov>.

⁴⁹ See GATT Article X, GATS Article VI, and TRIPs Article 41. In addition, the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the AD Agreement) and the SCM Agreement obligate Members to provide the opportunity for judicial review of administrative decisions on antidumping and countervailing duty matters. See the AD Agreement, Article 13; and the SCM Agreement, Article 23.

⁵⁰ See GATS Article VI:2(b) (A Member is not required to “institute such tribunals or procedures where this would be inconsistent with its constitutional structure or the nature of its legal system”); GATT Article X:2(c) (Members are not required to eliminate or substitute existing procedures that “in fact provide for an objective and impartial review of administrative action even though such procedures are not fully or formally independent of the agencies entrusted with administrative enforcement”); and TRIPs Article 41.5 (TRIPs “does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general”).

of TRIPs. Such tribunals shall be impartial and independent of the agency entrusted with administrative enforcement and shall not have any substantial interest in the outcome of the matter.

- (b) *Right to appeal.* Review procedures shall include the opportunity for appeal, without penalty, by the individuals and enterprises affected by an administrative action subject to review. If the initial right of appeal is to an administrative body, there shall in all cases be the opportunity to choose to appeal the decision to a judicial body. Notice of the decision on appeal and reasons for such decision shall be provided in writing. The appellant shall be informed of any right to further appeal.

The provision regarding impartial and independent review of administrative decisions generally confirms the existing obligations under GATT, GATS and TRIPs, although the provision appears to further elaborate the content of such obligations. The provision regarding the right to appeal, on the other hand, imposes more stringent obligations than required by GATT, GATS or TRIPs. Under GATT Article X, appeal to a court of the decision by an independent tribunal is merely referred to as a possibility.⁵¹ There is no reference to appeal of a tribunal decision in GATS. While judicial review of final administrative decisions is guaranteed under TRIPs, the right to appeal an initial judicial decision is subject to jurisdictional provisions in a Member's law concerning the importance of a case.⁵² By contrast, China is required to provide the affected parties *in all cases* the right to appeal the decision of an independent review to a judicial body, regardless whether the initial review was conducted by a judicial or an administrative tribunal. In addition, the obligations to provide the appellant with reasoned decisions in writing and to inform the appellant of any right to further appeal are also beyond the requirement of existing WTO rules.⁵³ Furthermore, China's judicial review obligations under the Protocol are unconditional, which contrasts with the provisions of GATT, GATS and TRIPs that exempt a Member from the judicial review obligations inconsistent with its existing legal system.⁵⁴

It should be noted that the judicial review provisions of the Protocol appear to have blended and summarized various elements of the relevant provisions of GATT, GATS and TRIPs. To the extent the Protocol sets a standard for judicial review of administrative actions without distinguishing whether such decisions relate to trade in goods, services or intellectual property rights, the various differences among the relevant provisions of GATT, GATS and TRIPs may become irrelevant to China.

⁵¹ GATT Article X:2(b) provides that the reviewing tribunals "shall be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; provided that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts."

⁵² See TRIPs Article 41.4.

⁵³ Cf., TRIPs Article 41.3 ("Decisions on the merits of a case shall *preferably* be in writing and reasoned") (emphasis added).

⁵⁴ See as note 50 above.

However, it is unclear to what extent the terms of the Protocol would replace the specific requirements of GATT, GATS and TRIPS, an issue that would have to be resolved by the interpreter of the Protocol on a case-by-case basis.⁵⁵

C. UNIFORM ADMINISTRATION

As a matter of principle, the WTO Agreement should apply to the entire customs territory of each Member, including its political subdivisions,⁵⁶ and a Member should administer all its laws, regulations, decisions and rulings “in a uniform, impartial and reasonable manner”.⁵⁷ It is, however, not entirely clear as to the exact extent to which a Member must maintain a uniform administration of the WTO rules throughout its territory. Technically, a Member is only required to “take such reasonable measures as may be available to it” to ensure the observance of GATT and GATS by regional and local governments and authorities within its territory.⁵⁸ Thus, it may be argued that the central government is not in breach when a subdivision violates GATT or GATS as long as the central government has taken all reasonable measures within its power to ensure local observance.⁵⁹ Although it is understood that the “reasonable measures” standard was meant to accommodate situations in which a federal government may not have the constitutional power to control its subsidiary government,⁶⁰ no provision under the WTO Agreement has explicitly excluded the application of the same standard to Members of non-federal governments. It is against this background that the obligations imposed on a number of acceding Members to ensure full WTO-compliance by their sub-central governments are considered “WTO-plus”.⁶¹

It should be made clear, however, that the “reasonable measures” standard does not relieve a Member from its responsibility for violation of WTO agreements by its political subdivisions. As a matter of law of treaties, a Member may not invoke its internal law as justification for not performing its obligations under the WTO

⁵⁵ In principle, to the extent there is a conflict between a provision of the Protocol and that of the Multilateral Trade Agreements, the provision of the Protocol should prevail, since the application of the Multilateral Trade Agreements to China is based on the terms of the Protocol pursuant to Article XII of the WTO Agreement. It is unclear, however, whether the principle of *lex specialis* should apply when the Protocol provides a different but less specific provision than the existing WTO provisions addressing the same subject matter. See Lennard, as note 33 above, at 70–72, discussing the use of *lex specialis* in WTO dispute settlement decisions.

⁵⁶ See, e.g., GATS Article 1 (“This Agreement applies to measures by Members affecting trade in services. ... For the purposes of this Agreement: ‘measures by Members’ means measures taken by: (i) central, regional or local governments and authorities; and (ii) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities”); SCM Agreement, Article 1 (defining government subsidies subject to its disciplines as including those by “any public body within the territory of a Member”).

⁵⁷ GATT Article X:2(a)

⁵⁸ GATT Article XXIV:12, and GATS Article 1:3(a).

⁵⁹ See J. Jackson, W. Davey and A. Sykes, *Legal Problems of International Economic Relations: Cases, Materials and Text*, 4th edn (West, 2002), p. 242.

⁶⁰ *Ibid.* See also Analytical Index, Article XXIV, pp. 771–774.

⁶¹ See text at note 21 above. Ten of the 15 acceding Members (excluding China) made undertakings to eliminate or nullify measures taken by sub-central authorities that were in conflict with the WTO Agreement or otherwise ensure uniform application of the WTO Agreement throughout their customs territories. See the Secretariat Note, as note 16 above, pp. 80–82, and the respective working party reports for Lithuania (para. 29), Moldova (para. 48), and Taipei (para. 15), as note 20 above.

agreements.⁶² The WTO rules specifically permit a Member to resort to the WTO dispute settlement procedures for matters arising from measures taken by local authorities of another Member.⁶³ In this sense, it makes little difference in practice whether a Member has taken reasonable measures to ensure local compliance.

Under the Protocol, the Chinese government, a non-federal structure, has undertaken the following obligations regarding its sub-central governments:

- (a) *Nullification of local rules inconsistent with WTO obligations.* The Protocol explicitly requires that “China’s local regulations, rules and other measures of local governments at the sub-national level shall conform to the obligations undertaken in the WTO Agreement and this Protocol”.⁶⁴ And China must “in a timely manner annul local regulations, government rules and other local measures that [are] inconsistent with China’s obligations” under the WTO Agreement.⁶⁵
- (b) *Uniform, impartial and reasonable administration.* China shall apply and administer in a uniform, impartial and reasonable manner “all its laws, regulations and other measures of central government as well as local regulations, rules and other measures issued or applied at the sub-national level ... pertaining to or affecting trade in goods, services, trade-related aspects of intellectual property rights (“TRIPs”) or the control of foreign exchange.”⁶⁶
- (c) *Establishment of a complaint mechanism.* China shall establish a mechanism under which individuals and enterprises can bring to the attention of the national authorities cases of non-uniform application of the trade regime.⁶⁷ When non-uniform application is established, the Chinese authorities must act promptly to address the situation utilizing the remedies available under China’s laws, taking into consideration China’s international obligations and the need to provide a meaningful remedy, and the individual or entity notifying China’s authorities will be informed promptly in writing of any decision and action taken.⁶⁸

The above obligations regarding uniform administration of laws are more elaborate and stringent than expressly required by the GATT or GATS, and they

⁶² See Vienna Convention on the Law of Treaties, Article 27 (“A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty.”), 8 Int’l Legal Materials (1969), 679.

⁶³ See Understanding on the Interpretation of Article XXIV of the General Agreement on Tariffs and Trade 1994, Section 14 (re Article XXIV:12), which provides: “The provisions of Article XXII and XXIII of GATT 1994 as elaborated and applied by the Dispute Settlement Understanding may be invoked in respect of measures affecting its observance taken by regional or local governments or authorities within the territory of a Member. When the Dispute Settlement Body has ruled that a provision of GATT 1994 has not been observed, the responsible Member shall take such reasonable measures as may be available to it to ensure its observance. The provisions relating to compensation and suspension of concessions or other obligations apply in cases where it has not been possible to secure such observance.”

⁶⁴ Section 2(A)(3) of the Protocol.

⁶⁵ WPR, para. 70, which was incorporated into the Protocol.

⁶⁶ Section 2(A)(2) of the Protocol.

⁶⁷ Section 2(A)(4) of the Protocol.

⁶⁸ WPR, para. 75, which was incorporated into the Protocol.

encompass not only the application of the GATT and GATS but also any other WTO provision applicable to China. Among these obligations the undertaking regarding the complaint mechanism is unique to China; no similar obligation has been imposed on any other acceding Member.

D. NATIONAL TREATMENT

National treatment, a major WTO obligation, extends to trade in goods, services and related intellectual property rights. The scope of the national treatment obligation, however, varies depending on specific WTO provisions. It is therefore necessary to review the applicable scope of the specific WTO agreements before analysing the WTO-plus national treatment obligations prescribed by the China Protocol.

The GATT national treatment obligation applies to imported products only, i.e., goods that have already cleared customs and other import procedures. Specifically, GATT Article III requires a WTO Member to treat products imported from any other Member no less favourably than like domestic products in respect of (i) internal taxes and other charges, and (ii) all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use.

The scope of the GATT national treatment is extended after the Uruguay Round to cover certain investment measures that may affect the internal sale of imported goods. The Agreement on Trade-Related Investment Measures (TRIMs) prohibits a Member from applying any investment measure that is inconsistent with the provisions of Article III or Article XI of GATT.⁶⁹ TRIMs identifies two specific types of measures as inconsistent with the national treatment obligation under GATT Article III:4: (a) laws and regulations that require an enterprise to purchase or use domestic products (local content requirements), and (b) laws and regulations that limit an enterprise's purchase or use of imported products to an amount related to the volume or value of local products that it exports (trade balancing requirements).⁷⁰ These requirements are considered inconsistent with GATT Article III:4 because they result in a preference for domestic products over imported products.

In contrast with the GATT national treatment obligation, which applies to imported goods regardless whether they are bound under Members' Goods Schedules, the national treatment obligation of a Member under the GATS is limited to the scope of its specific commitments set out in its Services Schedule.⁷¹ For those service sectors to which it has granted market access, the Member must accord services and service suppliers of any other Member, in respect of all measures affecting the supply of the services, treatment no less favourable than that it accords to its own like services and service providers, subject to any conditions and qualifications provided in the Services Schedule.

⁶⁹ See TRIMs Article 2.

⁷⁰ See TRIMs, Annex, Article 1.

⁷¹ See GATS Articles XVI:1 and XVII:1.

The TRIPs national treatment provisions require a Member to accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property as defined in TRIPs.⁷² The obligations are subject to the limits specified therein.⁷³

Provisions containing national treatment clauses are scattered throughout the China Protocol.⁷⁴ While some of these provisions merely confirm the existing WTO obligations,⁷⁵ others prescribe national treatment obligations that are not contained in the WTO agreements. Most of such WTO-plus rules require China to accord national treatment to foreign individuals and enterprises with respect to their investment and business activities in China.

1. *National Treatment Regarding Conditions Affecting Production in China*

Section 3 of the Protocol provides:

“Except as otherwise provided for in this Protocol, foreign individuals and enterprises and foreign-funded enterprises shall be accorded treatment no less favorable than that accorded to other individuals and enterprises in respect of:

- (a) the procurement of inputs and goods and services necessary for production and the conditions under which their goods are produced, marketed or sold, in the domestic market and for export; and
- (b) the prices and availability of goods and services supplied by national and sub-national authorities and public or state enterprises, in areas including transportation, energy, basic telecommunications, other utilities and factors of production.”

This national treatment obligation applies to treatment of foreign persons and foreign-funded enterprises⁷⁶ with respect to the conditions affecting their production of goods in China and the marketing and sales of such products. As such, this obligation is clearly beyond the scope of GATT Article III, which applies only to treatment of imported goods, or TRIMs, which concerns with measures inconsistent

⁷² See TRIPs Articles 1 and 3.

⁷³ See TRIPs Article 3.1.

⁷⁴ The Protocol (including the incorporated paragraphs of the Working Party Report) contains the following national treatment provisions: Sections 2(B)(3) (enterprises within special economic areas); Section 3 (Non-discrimination); Section 5 (Right to trade); Section 7(2) (Non-tariff measures); Section 8(2) (Import and export licensing); Section 11(4) (Taxes and charges levied on imports and exports); Section 13(4)(a) (Technical barriers to trade); WPR paras 18 and 19 (general national treatment commitments), and paras 22 and 23 (full compliance with the principle of non-discrimination between domestically produced and imported products, and commitment to repeal or modify specific legislation inconsistent with GATT Article III).

⁷⁵ E.g., the Protocol, Section 2(B)(3) (confirming that WTO provisions on non-discrimination and national treatment shall be fully observed in providing preferential arrangements for enterprises within special economic areas); Section 7(2) (applying non-tariff measures in strict conformity with GATT Article III); Section 13(4)(a) (ensuring the same technical standards apply to both imported and domestic products); and WPR paras 22 and 23 (full compliance with the principle of non-discrimination between domestically produced and imported products).

⁷⁶ The term “foreign-funded enterprise” is not defined in the Protocol. Under Chinese law, foreign-invested enterprises (FIEs) in the form of Sino-foreign equity joint venture, Sino-foreign co-operative joint venture (if registered as a limited liability company), wholly foreign-owned enterprise, foreign holding company or foreign-invested share company are Chinese legal persons. General information regarding FIEs is available at the official website of the Ministry of Foreign Trade and Economic Co-operation of China, at <www.moftec.gov.cn>.

with GATT Article III, or the national treatment obligation under GATS, which is limited to the specific services set out in China’s Services Schedule.

2. *National Treatment Regarding Right to Trade*

As part of its commitment on market economy reform,⁷⁷ China has undertaken to liberalize progressively its state trading regime and to grant all enterprises in China the right to import and export goods within three years of its WTO accession.⁷⁸ In this context, the Protocol provides:⁷⁹ “Except as otherwise provided for in this Protocol, all foreign individuals and enterprises, including those not invested or registered in China, shall be accorded treatment no less favourable than that accorded to enterprises in China with respect to the right to trade.”

In addition, “foreign individuals and enterprises and foreign-funded enterprises shall be accorded treatment no less favourable than that accorded to other individuals and enterprises in respect of the distribution of import and export licenses and quotas”.⁸⁰

These provisions address national treatment of foreign persons with respect to their business and trading opportunities in China, not the treatment of imported goods, and therefore are beyond the scope of GATT Article III and TRIMs. Insofar as import and export activities may constitute a service sector, they are, however, not included in China’s Services Schedule and consequently are not covered by GATS national treatment clauses.⁸¹ Thus, the national treatment obligation of China regarding the trading rights exceeds the existing WTO requirements.

3. *Equal Treatment Between Chinese and Foreign Nationals*

In addition to the specific national treatment clauses in the text of the Protocol, paragraph 18 of the Working Party Report sets out a comprehensive commitment that was incorporated into the Protocol: “The representative of China further confirmed that China would provide the same treatment to Chinese enterprises, including foreign-funded enterprises, and foreign enterprises and individuals in China.” As worded, this commitment to accord the same treatment to Chinese enterprises and all foreign persons in China does not have any limit on its scope of application.⁸² Such an unqualified

⁷⁷ See Section II.F below.

⁷⁸ Section 5.1 of the Protocol. This right to trade does not apply to goods listed in Annex 2A of the Protocol, which continue to be subject to state trading in accordance with the Protocol.

⁷⁹ Section 5.2 of the Protocol.

⁸⁰ Section 8.2 of the Protocol.

⁸¹ In comparison, domestic wholesale and retailing services are included in China’s Service Schedule, see Annex 9 to the Protocol, Schedule of Specific Commitments on Services, 4. Distribution Services: (B) Wholesale Trade Services, and (C) Retailing Services.

⁸² The format of this provision is highly unusual for a national treatment clause. Aside from the lack of a defined scope of application, the provision uses the term “same treatment”, instead of the phrase “treatment no less favorable than ...”. The “same treatment” standard may cause confusion as to whether the Chinese government can grant more favourable treatment to foreign persons than its own nationals, an issue that would not arise under the various national treatment clauses of the WTO agreements.

national treatment obligation is probably unintended by the Chinese government.⁸³ As set out, however, this provision undoubtedly goes beyond the scope of all national treatment obligations under the WTO agreements.

The above-identified national treatment clauses of the Protocol are primarily concerned with the treatment of foreign nationals in respect of their trading and investment activities in China. National treatment of foreign investors is more typically provided in bilateral or regional treaties concerning foreign investment.⁸⁴ While trade and investment are closely related, the current WTO legal framework does not address investment issues other than those identified in TRIMs or otherwise falling within the coverage of GATS. By requiring China to accord national treatment to foreign nationals with respect to their investment activities, the Protocol has clearly exceeded the current scope of the WTO agreements.

E. INVESTMENT MEASURES

As indicated above, the current WTO framework does not discipline government measures restricting cross-border investment except for those that are considered directly affecting trade in goods under TRIMs and those that affect the services subject to GATS. Under TRIMs, a WTO Member may not apply any investment measure that has the effect of discriminating against imported goods (inconsistent with GATT Article III) or restricting imports and exports (inconsistent with GATT Article XI). Specifically, TRIMs prohibits the following types of investment measures: local content requirements, trade balancing requirements, foreign exchange balancing requirements and export restrictions.⁸⁵

The Protocol explicitly confirms China's obligations under TRIMs.⁸⁶ In addition, Section 7(3) of the Protocol sets forth a special undertaking of China:

Without prejudice to the relevant provisions of this Protocol, China shall ensure that ... any other means of approval for ... investment by national and sub-national authorities, is not conditioned on: whether competing domestic suppliers of such products exist; or performance

⁸³ In fact, para. 17 of the Working Party Report states that the representative of China emphasized the importance of China's commitments on non-discrimination, but noted that "any commitment to provide non-discriminatory treatment to Chinese enterprises, including foreign-funded enterprises, and foreign enterprises and individuals in China, would be subject to other provisions of the Draft Protocol and, in particular, would not prejudice China's rights under the GATS, China's Schedule of Specific Commitments or commitments undertaken in relation to trade related investment measures." Paragraph 17, however, was not incorporated into the Protocol and therefore is not legally binding.

⁸⁴ It is interesting to note that since the early 1980s China has entered into more than 70 bilateral investment treaties, of which only a minority contain national treatment provisions. For a list of China's bilateral investment treaties, see ICSID, *Bilateral Investment Treaties, China*, available at <www.worldbank.org/icsid>.

⁸⁵ See TRIMs, Annex.

⁸⁶ Section 7(3) of the Protocol provides: "China shall, upon accession, comply with the TRIMs Agreement, without recourse to the provisions of Article 5 of the TRIMs Agreement. China shall eliminate and cease to enforce trade and foreign exchange balancing requirements, local content and export or performance requirements made effective through laws, regulations or other measures. Moreover, China will not enforce provisions of contracts imposing such requirements." Article 5 of the TRIMs provides developing country Members with a five-year transitional period to fully comply with its requirements.

requirements of any kind, such as local content, offsets, the transfer of technology, export performance or the conduct of research and development in China.

This undertaking is further elaborated in Paragraph 203 of the Working Party Report, which was incorporated into the Protocol:

“The allocation, permission or rights for ... investment would not be conditional upon performance requirements set by national or sub-national authorities, or subject to secondary conditions covering, for example, the conduct of research, the provision of offsets or other forms of industrial compensation including specified types or volumes of business opportunities, the use of local inputs or the transfer of technology. *Permission to invest ... would be granted without regard to the existence of competing Chinese domestic suppliers.* Consistent with its obligations under the WTO Agreement and the Draft Protocol, the freedom of contract of enterprises would be respected by China.” (emphasis added)

Couched in the language of these provisions is a sweeping commitment by China to provide market access to foreign investment.⁸⁷ Pursuant to this commitment, China may not impose “performance requirements of any kind” as condition for approval of foreign investment in China, nor shall it restrict foreign investment to protect competing domestic industries. Such a general obligation to liberalize market access to foreign investment far exceeds the scope of TRIMs.⁸⁸

The general investment undertaking by China, together with its commitment to accord national treatment to foreign investors discussed above, are the first such obligations within the WTO legal framework. Liberalization of investment policies has been the subject of multilateral negotiations for years, both within and without the WTO/GATT framework, but the efforts have thus far failed to produce a comprehensive investment agreement at the multilateral level.⁸⁹ There is not even a consensus as to whether certain investment measures produce trade-distorting effect.⁹⁰ Many developing country Members are jealously protective of the freedom to set their own development strategies, of which foreign investment policy is an important part. It was the lack of agreement on the investment issues during the Uruguay Round that led to the conclusion of a limited-scoped agreement of TRIMs, a compromise

⁸⁷ The Working Party Report also contains a number of market access commitments of China on foreign investment in automobile industries, which were incorporated into the Protocol. See WPR paras 204–208. It appears that because such market access commitments on investment do not fit in the existing WTO framework for market access obligations (the Goods and Services Schedules annexed to GATT and GATS), they are set out in the Working Party Report on an *ad hoc* basis.

⁸⁸ It is unclear whether this broad commitment on investment, no longer confined to its effect on trade in goods, can avail itself of the exceptions under the GATT, such as those of GATT Articles XX and XXI, as in the case of TRIMs. Article 3 of TRIMs explicitly provides: “All exceptions under GATT 1994 shall apply, as appropriate, to the provisions of this Agreement”. In contrast, Section 7(3) of the Protocol merely states that this general obligation on investment is without prejudice to relevant provisions of the Protocol. The lack of a clearly defined relationship between China’s investment commitment and the existing WTO agreements, especially the GATT, GATS and TRIMs, may give rise to issues of interpretation in future disputes over the scope of the commitment. See discussion in Section III.D.4 below.

⁸⁹ For a general discussion on the effort to negotiate an investment code within the GATT framework during the Uruguay Round and the effort to negotiate a multilateral agreement on investment (MAI) within the OECD forum, see Michael J. Trebilcock and Robert Howse, *The Regulation of International Trade*, 2nd edn (London: Routledge, 1999), pp. 351–353, 357–365. For Doha Round negotiation agenda relating to investment, see WTO, *Trade and Investment, the Doha Mandate*, at <www.wto.org>.

⁹⁰ See Trebilcock and Howse, *ibid.*, at 352.

between different perspectives of the trading nations. In light of this background, the sweeping investment undertaking of China is nothing short of remarkable, although its significance for future WTO negotiations on investment measures remains to be seen.

F. MARKET ECONOMY COMMITMENTS

The WTO agreements do not prescribe any particular economic system for the Members. The multilateral trading system, however, is constructed with market economy assumptions. Consequently, it has been historically a major challenge for the system to integrate centrally planned economies, also known as “non-market economies” (NMEs).⁹¹

The problem of integrating NMEs into the system has largely abated in the post-cold war era when most of the former centrally planned economies began transforming into market economies. Prior to China’s accession, ten such transition economies joined the WTO.⁹² Due to the transforming nature of their economies, these countries all made certain commitments regarding their market-oriented economic reforms. Most such commitments, however, consisted of either confirmation to abide by specific WTO rules or statements certifying their existing market economy practices.⁹³ The only exception was the commitment to continue to provide information on their privatization programmes, an obligation not envisaged by the WTO system.⁹⁴

In contrast with the cases of other transition economies, China has made specific market economy commitments that are not limited to confirmations to comply with WTO rules or statements of economic realities. Instead, they are obligations undertaken on an ongoing basis.⁹⁵ The most significant of such obligations include the following:

⁹¹ The GATT experience with the accessions of several former NMEs (Yugoslavia, Poland, Romania, and Hungary) is generally regarded as unsuccessful. For a recount of the history of GATT and centrally planned economies, see Alexander Polouektov, *Non-Market Economy Issues in the WTO Anti-dumping Law and Accession Negotiations—Revival of a Two-tier Membership?*, 36 J.W.T. 1 (2002), 5–12. See also Jackson, as note 11 above, at 325–332, for an introduction to the issues involved in integrating NMEs into the GATT system.

⁹² See note 18 above.

⁹³ For a summary of the market economy commitments of a number of former centrally-planned economies in their WTO accessions, see Polouektov, as note 91 above, at 26–28.

⁹⁴ Although private enterprises are the hallmark of market economies, the WTO system is not directly concerned with the form of ownership of traders; rather, it focuses on the behaviour of enterprises that are granted monopoly or exclusive rights by the government, be they owned by the government or private parties. See GATT Article XVII *State Trading Enterprises*, and GATS Article VIII *Monopolies and Exclusive Service Suppliers*. See also Will Martin and Christian Back, “The Importance of State Trading in China’s Trade Regime”, in Frederick M. Abbott (ed.), *China in the World Trading System: Defining the Principles of Engagement*, (The Hague: Kluwer Law International, 1998), p. 156 (“what matters under the GATT is not ownership, but the exclusivity that allows non-competitive behaviour”, citing B. Hoekman and M. Kostecki, *The Political Economy of the World Trading System: from GATT to WTO* (Oxford: Oxford University Press, 1995)).

⁹⁵ Technically, there is a major difference between a confirmation that prices of all goods are currently determined by market forces and an undertaking to let market forces determine prices of all goods. The confirmation warrants the status of an economic reality but does not include an obligation to maintain that reality for the future.

1. *Obligation to Let Market Forces Determine Prices in China*

Section 9 of the Protocol prescribes an overall market economy obligation for China: the obligation to “allow prices for traded goods and services in *every sector* to be determined by market forces” except for those specified in Annex 4 of the Protocol (emphasis added). Annex 4 contains a list of goods and services that may be subject to price controls consistent with WTO rules. The list includes: (i) four categories of goods (tobacco, edible salt, natural gas and pharmaceuticals) and four categories of service sectors (public utilities, postal and telecommunication services, entrance fee for tour sites, and education services) that may remain subject to government pricing; and (ii) six categories of goods (grain, vegetable oil, processed oil, fertilizer, silkworm cocoons and cotton) and six service sectors (transport services, professional services, commission agents’ services, banking services, prices of residential apartments, and health-related services) that may remain subject to government guidance pricing. Except in exceptional circumstances, and subject to notification to the WTO, China may not extend price controls to goods and services beyond those listed in Annex 4. Meanwhile, China must make best efforts to reduce and eliminate these controls.⁹⁶

The obligation to let market forces determine all prices in China except for the specified few represents a fundamental commitment of the Chinese government to a market-based economic system. In a sense, this obligation is by far the most significant of all WTO obligations that China has undertaken, as its fulfilment will ultimately ensure the compatibility between the Chinese economic regime and the WTO system.

2. *Obligations Not to Influence State-Owned and State-Invested Enterprises*

Unlike the case of other transition economies, the China Protocol does not contain any language concerning privatization since the Chinese government has not sponsored large-scale privatization programmes as commonly practised in other transition economies. Instead, China has made certain general commitments regarding “state-owned and state-invested enterprises”.⁹⁷ Specifically, China has undertaken to ensure that

“... all state-owned and state-invested enterprises [will] make purchases and sales based solely on commercial considerations, e.g., price, quantity, marketability and availability and that the enterprises of other WTO Members [will] have an adequate opportunity to compete for sales to and purchases from these enterprises on non-discriminatory terms and conditions. In addition, the Government of China [will] not influence, directly or indirectly, commercial decisions on the part of state-owned or state-invested enterprises, including on the quantity, value or country

⁹⁶ In addition to Section 9 of the Protocol, the Working Party Report discussed pricing policies in paras 50–64, of which paras 60, 62 and 64 were incorporated into the Protocol. The additional rule commitments contained in the Working Party Report include that to publish the list of goods and services subject to state pricing and changes thereto, that not to use price controls for purposes of affording protection to domestic industries or service providers, and that to apply all price controls in a WTO-consistent manner.

⁹⁷ The term “state-owned or state-invested enterprises” is not defined in the Protocol.

of origin of any goods purchased or sold, except in a manner consistent with the WTO Agreement.”⁹⁸

The first part of this undertaking closely follows the language of GATT Article XVII paragraph 1(b), which imposes certain discipline on state trading enterprises. The Protocol now extends this GATT requirement to all state-owned and state-invested enterprises regardless whether they are engaged in foreign trade activities. In addition, the Chinese government has taken a pledge not to influence commercial decisions of state enterprises, either directly or indirectly, which is an obligation not contained expressly in any of the WTO agreements.

3. *Obligations to Liberalize Foreign Trade Regime*

Prior to its accession, China restricted the number of companies that had the right to import and export goods from China and the products that a particular company could import or export.⁹⁹ Under Section 5.1 of the Protocol, China undertakes to “progressively liberalize the availability and scope of the right to trade, so that, within three years after accession, all enterprises in China shall have the right to trade in all goods” except for those specified in Annex 2A of the Protocol.¹⁰⁰ As previously discussed, thanks to the WTO-plus national treatment obligations of China, such trading rights are also extended to foreign individuals and entities not invested or registered in China.¹⁰¹ A liberalization schedule covering 245 specific products is set out in Annex 2B of the Protocol, and additional details are provided in the several paragraphs of the Working Party Report that were incorporated into the Protocol.¹⁰² China has promised to “complete all necessary legislative procedures to implement these provisions” during the three-year transition period.¹⁰³

As for the goods that continue to be subject to state trading, the Protocol specifies a number of obligations for China. Section 6 of the Protocol requires the Chinese government to “refrain from taking any measure to influence or direct state trading enterprises as to the quantity, value, or country of origin of goods purchased or sold, except in accordance with the WTO Agreement”. Further, China must “ensure that import purchasing procedures are fully transparent, and in compliance with the WTO

⁹⁸ WPR, para. 46, which was incorporated into the Protocol. In addition, China confirmed in WPR para. 47, also incorporated into the Protocol, that laws and regulations relating to procurement by state enterprises would not be considered laws and regulations relating to government procurement and therefore their purchases and sales would be subject to GATT Article III and GATS Articles II, XVI and XVII.

⁹⁹ See WPR, para. 80, indicating that the right to import and export goods in China was available only to 35,000 Chinese enterprises, and that although foreign-invested enterprises had the right to trade, such right was restricted to importation for production purposes and exportation according to the scope of its business.

¹⁰⁰ Annex 2A contains a list of goods that are subject to state trading. Annex 2A1 lists 84 products in seven categories, including grain, vegetable oil, sugar, tobacco, processed oil, chemical fertilizer and cotton, the import of which is subject to state trading. Annex 2A2 lists 134 agricultural products and commodities, such as tea, grains, metals, coal, oil, silk, and cotton, the export of which is subject to state trading.

¹⁰¹ See Section II.D.2, above.

¹⁰² See WPR, paras 83, 84, 86.

¹⁰³ Section 5.1 of the Protocol.

Agreement” and must provide to the WTO “full information on the pricing mechanisms of its state trading enterprises for exported goods”.¹⁰⁴ The state trading obligations of China are further elaborated in several paragraphs of the Working Party Report.¹⁰⁵ All of these specific obligations of China are in addition to the existing obligations of Members regarding state trading enterprises under GATT Article XVII and monopolies and exclusive service suppliers under GATS Article VIII.

It should be made clear that the above-discussed market economy commitments are technically “WTO-plus” obligations because they are not required by any provision of the WTO agreements. Yet, to the extent that they reflect the market economy assumptions of the WTO system, these undertakings do not necessarily impose more stringent obligations on China when compared with other Members who are traditionally market economies.

G. TRANSITIONAL REVIEW

Pursuant to the Trade Policy Review Mechanism (TPRM) set forth in Annex 3 of the WTO Agreement, all WTO Members are subject to periodical review of their trade policies and practices. The purpose of such review is to achieve greater transparency in, and understanding of, Members’ trade policies and practices, thereby improving adherence by all Members to WTO rules and commitments and the smoother functioning of the multilateral trading system.¹⁰⁶ The frequency of the review for individual Members depends on their share of world trade in a recent representative period: the first four trading Members so identified (United States, European Union, Japan, and Canada) are reviewed once every two years, the next 16 trading powers every four years, and the remaining countries every six years with the possibility of a longer interim period for the least-developed countries. The review is conducted by the Trade Policy Review Body, which is a function discharged by the General Council.¹⁰⁷ Since the establishment of the WTO, the Trade Policy Review Body has conducted more than 100 such reviews.¹⁰⁸

Separate from the TPRM, Section 18 of the Protocol establishes a special transitional review mechanism to examine China’s implementation of its WTO obligations. Pursuant to this transitional review mechanism, China is subject to a total of nine reviews during the first ten years after its accession: the first eight will take place annually and the last one in the tenth year or an earlier date to be decided by the General Council. Each review is to be conducted at two levels, first by the 16 subsidiary bodies of the WTO that have a mandate covering China’s

¹⁰⁴ Sections 6.1 and 6.2 of the Protocol.

¹⁰⁵ See WPR paras 208–217, of which paras 210, 212, 213, 215, 217, contain specific commitments that were incorporated into the Protocol, including those regarding state trading in oil products and silk.

¹⁰⁶ See para. A(i) of TPRM.

¹⁰⁷ See Article VI:4 of the WTO Agreement.

¹⁰⁸ See WTO, *Trade Policy Reviews*, at <www.wto.org>.

commitments,¹⁰⁹ and then by the General Council. Prior to each review, China must provide to the 16 subsidiary bodies the information specified in Annex 1A of the Protocol, which sets out a comprehensive list covering each area of China's commitments under the WTO Agreement and the Protocol. The results of the review by the subsidiary bodies will be reported to the General Council, which will in turn conduct its review in accordance with the framework set out in Annex 1B of the Protocol. The General Council may make recommendations to China based on the results of the review.

Thus, China has been made subject to a much more stringent discipline than any other Member of the WTO. During the first ten years of its accession, instead of the normal trade policy review under the TPRM¹¹⁰ China will be constantly monitored and scrutinized by the WTO for its compliance with WTO rules and its specific commitments. Moreover, under the transitional review mechanism, the General Council may make recommendations to China, a function not present in the TPRM. Although it is unclear whether such recommendations would be legally binding,¹¹¹ China will certainly be expected to follow them in its future practice.

It should also be pointed out that the spirit of the transitional review mechanism appears to be different from that of the TPRM trade policy review. The objective of the TPRM, as indicated above, is to promote transparency in, and understanding of, Members' trade policies and practices and to assess the impact of such policies and practices on the multilateral trading system. Hence, review under the TPRM "is not intended to serve as a basis for the enforcement of specific obligations under the [WTO] Agreements or for dispute settlement procedures, or to impose new policy commitments on Members".¹¹² Accordingly, the TPRM is excluded from the coverage of the Dispute Settlement Understanding (DSU).¹¹³ In comparison, the purpose of the transitional review is to ensure China's compliance with its WTO obligations.¹¹⁴ Unlike the TPRM, the transitional review mechanism is subject to the DSU because the Protocol is an integral part of the WTO Agreement, a "covered agreement" for the purpose of the DSU. Consequently, China's obligations regarding the transitional review are enforceable through the WTO dispute settlement

¹⁰⁹ The 16 subsidiary bodies are: Council for Trade in Goods, Council for TRIPs, Council for Trade in Services, and Committees on Balance-of-Payments Restrictions, Market Access, Agriculture, Sanitary and Phytosanitary Measures, Technical Barriers to Trade, Subsidies and Countervailing Measures, Antidumping Measures, Customs Valuation, Rules of Origin, Import Licensing, TRIMs, Safeguards, and Trade in Financial Services. See footnote to Section 18.1 of the Protocol.

¹¹⁰ Under the current TPRM procedure, China should be reviewed every four years. The TPRM reviews on China, however, will be rendered redundant by the transitional reviews during the 10-year period. The Protocol contains no explanation as to the relationship between the transitional review mechanism and the TPRM.

¹¹¹ If such recommendations are "decisions" of the General Council within the meaning of Article IX:1 of the WTO Agreement, they should have the same legal effect as other General Council decisions. See Article IX:1 of the WTO Agreement.

¹¹² Para. A(i) of the TPRM.

¹¹³ See DSU, Article 1.1 and Appendix 1 *Agreements Covered by the Understanding*.

¹¹⁴ Although during the transitional review "China also can raise issues" relating to any reservations made by other WTO Members under Section 17 of the Protocol and the General Council may make recommendations to other Members in these aspects, the only mandatory provisions of the transitional review mechanism are those regarding China's implementation of its WTO obligations. See Sections 18.1 and 18.2 of the Protocol.

procedure. Moreover, the results of the transitional review are not precluded from serving as the basis for enforcement of other WTO obligations of China.¹¹⁵

The justification for imposing such a separate and more rigorous review mechanism on China is unclear.¹¹⁶ Given the nature of the transitional review, it is not surprising that the process of the first such review was rife with contention.¹¹⁷ Completed in December 2002, the review did not result in any conclusion on China’s compliance record or any recommendation by the General Council.¹¹⁸ The effect of future reviews remains to be seen.

III. IMPLICATIONS OF THE WTO-PLUS OBLIGATIONS FOR THE WTO LEGAL SYSTEM

A. NATURE AND ENFORCEABILITY OF WTO-PLUS OBLIGATIONS

It is important to bear in mind that the WTO-plus obligations identified above are not unilateral commitments of China or merely goals for China to achieve. Instead, they are country-specific rule obligations of the WTO. Like country-specific market access obligations of the WTO, these rule obligations are commitments made by China only, but “represent a common agreement among all Members”.¹¹⁹

The Protocol, including the rule commitments set out in the Working Party Report, constitutes “an integral part of the WTO Agreement”.¹²⁰ As such, the Protocol becomes part of a “covered agreement” for the purpose of the Dispute Settlement Understanding, and its provisions are fully enforceable through the WTO dispute settlement procedure. Under the DSU, the failure of a Member to carry out its obligations under a covered agreement is considered a *prima facie* case of nullification or impairment, meaning there is a presumption that a breach of the rules has an adverse impact on other Members and it is up to the Member accused of the breach to rebut

¹¹⁵ Section 18.3 of the Protocol expressly provides: “Consideration of issues pursuant to this Section shall be without prejudice to the rights and obligations of any Member, including China, under the WTO Agreement or any Plurilateral Trade Agreement, and shall not preclude or be a precondition to recourse to consultation or other provisions of the WTO Agreement or this Protocol.”

¹¹⁶ The transitional review obligation was included in the China Protocol “mainly on the insistence of the United States, which wanted a means of ensuring WTO oversight of China’s implementation efforts”. BNA, WTO Reporter, 10 December 2002, *Contentious WTO China Review Said Likely to End with Whimper, not Bang*, available at <www.bna.com>.

¹¹⁷ See BNA, WTO Reporter, *ibid.*, recounting the several controversies between China and other Members throughout the year over the various aspects of the review procedures. See also BNA, International Trade Reporter, 26 September 2002, *WTO: China’s Refusal to Answer Quad Queries Shuts Down Compliance Review Session*, available at <www.bna.com>, reporting that China had refused to provide written answers to questions posed by the United States, European Union, Japan and Canada in the Committee on Market Access, claiming that written answer was not required by the Protocol and the review had put an enormous burden on its understaffed administration and diverted resources away from other trade priorities.

¹¹⁸ See BNA, WTO Reporter, 11 December 2002, *In First Transitional Review for China, WTO Offers Praise for Efforts, No Conclusions*, available at <www.bna.com>.

¹¹⁹ WTO Appellate Body Report, *European Communities—Customs Classification of Certain Computer Equipment*, WTO/DS62, 67 and 68/AB/R (adopted 22 June 1998), para. 109 (“while each Schedule represents the tariff commitments made by *one* Member, they represent a common agreement among *all* Members.” (emphasis in original)).

¹²⁰ Section 1.2 of the Protocol.

the charge.¹²¹ Accordingly, should China fail to carry out any of its WTO-plus obligations, be it the obligation to allow market forces to determine prices of all goods and services or the obligation to make translation of every relevant local regulation, any other WTO Member may seek redress through the WTO dispute settlement system,¹²² and it would be incumbent upon China to prove that such failure did not have an adverse impact on that Member. The consequences of a failure to comply with the WTO-plus rules would be no different from that of a failure to comply with standard WTO rules.

B. THE UNSPOKEN "RATIONALE"

Perhaps the most astonishing aspect of the Protocol is the absence of any WTO explanation for the creation of the China-specific rules. Throughout the hundreds of pages of the Protocol and the Working Party Report there is not a single passage setting forth the rationale or the object and purpose of such differential treatment of China.¹²³ Apparently, the standard WTO rules of conduct were perceived as insufficient or inadequate for regulating China trade, hence the need for additional rules. But what are the special conditions of China that would warrant the imposition of the extra disciplines that are not imposed on any other Member of the WTO? Without the benefit of an official explanation, one can only surmise the answer to that question.

Manifestly, what distinguishes China from other countries that have so far acceded to the WTO is the sheer size of its economy. As previously indicated, China is now the sixth largest trading nation in the world.¹²⁴ Although its imports and exports account for only 4 percent of the total world trade, given the ample supply of low-cost labour in this populous country and the tremendous energy being released by the further deepening of its economic reforms, the potential for economic growth in China is enormous. Threatened by the competitiveness of Chinese producers on the one hand, and eager to gain more access to the vast Chinese market on the other, major trading powers were motivated not only to extract hundreds of market access concessions from China, but also to bend WTO rules to further their interests in dealing with China.

¹²¹ See DSU Article 3.8.

¹²² Note that DSU Article 3.7 cautions a Member to exercise its judgment as to whether a formal action would be "fruitful" before bringing a case.

¹²³ In the context of discussing whether China should have the right to enjoy all the special treatment accorded to developing country WTO Members, para. 9 of the Working Party Report states "Some members of the Working Party indicated that because of the significant size, rapid growth and transitional nature of the Chinese economy, a pragmatic approach should be taken in determining China's need for recourse to transitional periods and other special provisions in the WTO Agreement available to developing country WTO Members." While the "significant size, rapid growth and transitional nature of the Chinese economy" were cited as reasons for not allowing China to enjoy a full special treatment accorded to developing country Members—such treatment is primarily in the form of reduced WTO disciplines—these factors were not given as the reasons for subjecting China to more stringent WTO disciplines.

¹²⁴ As note 34 above.

The motives for treating China differently, however, do not equal the “rationale” for such treatment. There must be a perceived need for each of the China-specific rules. The WTO-plus obligations identified above may be divided into three general categories: (a) rule-of-law obligations (i.e., the commitments regarding transparency, judicial review, uniform administration, and transitional review); (b) market economy obligations; and (c) investment liberalization obligations (i.e., the commitments regarding investment measures and national treatment of foreign businesses). The “rationale” for each category may differ.

As previously discussed, the market economy obligations of the Protocol would ensure the compatibility of the Chinese system with the WTO system. Given the lack of existing provisions in the WTO Agreement to integrate NMEs and that China is a large transition economy with an NME legacy, understanding the significance and necessity of these obligations seems straightforward.

The rationale becomes less apparent for the rule-of-law type of WTO-plus obligations. Granted that China had many problems in the administration of its trade law, and more stringent disciplines on the rule of law may be necessary for China to effect implementation of its WTO obligations. However, conditions in China were hardly unique among developing country and transition economy Members. It is therefore questionable why the existing WTO disciplines on transparency, judicial review, and trade policy reviews would be considered insufficient only in the case of China.

Even less apparent is the “rationale” behind the general obligations of China on liberalization of investment. Since the current WTO legal framework does not regulate investment measures unless they fall within the narrow scope of TRIMs, these obligations were not made out of the necessity for compliance with WTO law. Rather, they were imposed to open the Chinese market further to foreign investment, an objective of great interest to the major trading powers, but one not yet addressed by WTO disciplines.

It appears therefore that China is treated with the extra discipline primarily because of its importance in world trade and investment. However, this unspoken “rationale” raises serious questions for the WTO legal system: should the WTO begin to impose additional rule obligations (as opposed to market access obligations) on an individual Member based on its relative importance in world trade? And if so, what should the criteria be for measuring such importance? The lack of any articulated WTO rationale for the China-specific rules not only leaves us in the dark on these issues, but also imposes potential constraints on the WTO dispute settlement system, as will be discussed below.

C. POSITIVE IMPLICATIONS FOR WTO LAW

The WTO-plus rules of the Protocol can be expected to have a salutary effect on China and world trade. This is because the plus rules are generally consistent with the WTO objective of trade liberalization and are created to strengthen rather than

weaken WTO multilateral disciplines. A more transparent, uniform, and liberal trade and investment regime in China will certainly help to boost trade and investment there, which in turn can contribute to a growth in the global production of, and trade in, goods and services.

In addition to their impact on China and world trade, the WTO-plus rules may have certain positive implications for WTO law as set forth below.

1. *Market Economy Obligations: Filling a void in WTO law*

Of the various WTO-plus obligations of China, the market economy commitments may have a special significance for the WTO legal system. As discussed above, the WTO Agreement does not prescribe any particular economic system for its Members, although its rules are based on market economy assumptions. As a result, the WTO system is considered ill-equipped to integrate non-market economies. The same concern over the inadequacy of the WTO system to regulate NMEs has extended, rightly or wrongly, to transition economies undergoing the transformation from a centrally planned economy to a market-oriented economy.¹²⁵ In the previous accessions of transition economies, the relevant WTO accession working parties examined particular aspects of the economic regime of the transition economy applicants and required them to undertake certain commitments regarding their market economy reforms; none of the protocols of accession of these transition economies, however, contained substantive market economy obligations.¹²⁶

The China Protocol, therefore, is the first WTO legal document that prescribes market economy obligations for a Member.¹²⁷ Short of a definition of “market economy” in WTO law, the market economy obligations of China—particularly the obligation to let market forces determine all prices of goods and services except for a few specified categories and the obligations regarding state-owned enterprises—are the closest to reflecting an understanding of the WTO Members on the criteria of a market economy. In that sense, the Protocol provisions on market economy obligations have contributed to filling a void in WTO law, and such provisions may help to clarify the standard for accession of other transition economies in the future.

2. *Setting a New Standard for WTO Rules and Trade Liberalization?*

Given that the WTO-plus rules on China expand existing WTO disciplines, one would expect naturally that these plus rules could have a positive impact on the future

¹²⁵ For a thorough critique of unfair treatment of transition economy Members by other WTO Members in their anti-dumping practice, see Polouektov, as note 91 above.

¹²⁶ See text at notes 93 and 94 above.

¹²⁷ It should be noted that thanks to the Protocol, whether China develops and maintains a market economy is no longer a mere matter of domestic policy; instead, it has become a matter of China's international treaty obligations. The Protocol provisions on market economy represent a constitutional commitment of China to a market-based economic system. The implications of these obligations are profound for China.

development of WTO law. After all, it should be in the interest of the WTO to raise the standards of WTO disciplines across the board for all its Members and to push its trade liberalization agenda to new areas such as investment.¹²⁸

On the other hand, it might be unrealistic to expect such a “spill-over” effect of the WTO-plus rules. Many Members, especially developing country Members, may not be interested at all in expanding the existing WTO disciplines in the direction of China’s WTO-plus obligations. In fact, a statement contained in paragraph 9 of the Working Party Report explicitly cautions against such expectation:¹²⁹ “Members reiterated that all commitments taken by China in her accession process were solely those of China and would prejudice neither existing rights and obligations of Members under the WTO Agreement nor *on-going and future WTO negotiations* and any other process of accession” (emphasis added).

This statement was not incorporated into the Protocol and therefore is not legally binding. Nonetheless, Members may rely on it in good faith in resisting any attempt to globalize the plus obligations. It remains to be seen, therefore, to what extent the WTO-plus rules of the Protocol may influence future development of WTO disciplines.

D. NEGATIVE IMPLICATIONS FOR THE WTO LEGAL SYSTEM

Their positive effects notwithstanding, the WTO-plus obligations may harbour potentially grave implications for the WTO legal system. The WTO-plus obligations are imposed on China (or required to be undertaken by China) on a discriminatory basis—no other WTO Member is subject to them. Singling out one Member for differential treatment under the WTO Agreement is inconsistent with the basic WTO principle of non-discrimination.¹³⁰ Even though the WTO-plus obligations do not in themselves violate specific non-discrimination clauses of the WTO agreements,¹³¹ they do result in the creation of different classes of Members within the organization. The differential treatment of China may be justified if supported by reasons that are

¹²⁸ It should also be in the interest of China, now it has joined the organization, to see that its plus obligations be equalized by new commitments of other Members. Having assumed sweeping rule obligations on investment, for instance, China might support the major investing country Members in calling for a multilateral investment agreement within the WTO. It is not yet clear where China stands on the negotiation of WTO multilateral rules on cross-border investment in the Doha Round.

¹²⁹ The statement was made in the context of the discussion why a pragmatic approach should be taken in determining China’s need for recourse to transitional periods and other provisions in the WTO Agreement that grant special treatment to developing country Members.

¹³⁰ “Elimination of discriminatory treatment in international trade relations” is set out in the Preamble of the WTO Agreement as one of the objectives of the WTO.

¹³¹ The non-discrimination clauses of the WTO agreements generally require a Member to treat all other Members equally (MFN treatment) with respect to the specific matters identified in the clauses. See e.g., GATT Article I and GATS Article II. Since the WTO-plus obligations are obligations of China, not obligations of other Members, they do not in themselves give rise to the issue of how other Members treat China under those clauses. Note that under the MFN principle, China is obligated to comply with its WTO-plus obligations *vis-à-vis* all other Members.

considered legitimate by the system.¹³² The Protocol, however, has failed to provide such reasons.¹³³

Moreover, the creation of member-specific rules is potentially damaging to the WTO rule of law, a concept that has become increasingly important for the effective functioning of the WTO system.

1. *The Concept of WTO Rule of Law*

The results of the Uruguay Round have transformed a mostly power-based, diplomacy-oriented world trading system into a mostly rule-based and principle-oriented trading system.¹³⁴ Naturally, a rule-based system demands the rule of law, not the rule of power. While some elements of rule of law also existed under the GATT, it is the establishment of the WTO that has made the rule of law an indispensable norm for the world trading system.¹³⁵

The concept of rule of law finds expression in many aspects of the WTO system. The most salient features of this rule-based system are probably the uniformity of WTO rules of conduct and the new dispute settlement mechanism. For the time being, the WTO dispute settlement mechanism, with its compulsory adjudication, binding outcomes and creation of the Appellate Body, serves as the chief guardian for the WTO rule of law. However, a rule of law requires more than a sound adjudication mechanism. Like any legal system, the WTO legal system must possess certain basic elements of rule of law in order to function effectively. Such basic elements of rule of law should at least include: (1) generality (laws must be generally applicable and must not be aimed at a particular member in society); (2) transparency (laws must be public and readily accessible); (3) clarity (laws must be relatively clear); (4) consistency (laws must be consistent on the whole); (5) capability of being implemented (laws must be capable of being followed); and (6) enforcement (laws must be enforced).¹³⁶ While the

¹³² “Unequal treatment is never called discriminatory when the reason for differential treatment is considered legitimate.” Robert E. Hudec, *Tiger Tiger, In the House: A Critical Appraisal of the Case Against Discriminatory Trade Measures*, in Robert E. Hudec, *Essays on the Nature of International Trade Law* (London: Cameron May, 1999), p. 322.

¹³³ See Section III.B above.

¹³⁴ See Hilf, as note 36 above, at 114–115, suggesting the world trading system has gone through a triple jump, from a power-oriented system to a rule-oriented and then a rule-based and principle-oriented system, and citing the Singapore Ministerial Declaration that refers to the WTO system as a “rule-based system” (WT/MIN(96)DEC).

¹³⁵ Mike Moore, the first WTO Director-General, depicted the rule of law as a “cornerstone” of the WTO, stating that “one of the essential functions of the WTO is to ensure that the rule of law, not force or power, presides over the conditions of international trade”. Mike Moore, *The WTO, Looking Ahead*, 24 *Fordham Int’l L.J.* 1 (2000), 2–3. See also Hilf, as note 36 above, at 120 (identifying rule of law as one of the WTO principles); and J.H.H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats, Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 35 *J.W.T.* 2 (2001), 191 (suggesting the paradigm shift to the rule of law at the WTO will inevitably be accompanied by the culture of lawyers).

¹³⁶ See Randall Peerenboom, *Let One Hundred Flowers Bloom, One Hundred Schools Contend: Debating Rule of Law in China*, 23 *Mich. J. Int’l L.* (Spring 2002), 478–479, identifying a list of elements constituting the core concept of rule of law for any legal system, which follows “the influential account” by Lon Fuller that laws “be general, public, prospective, clear, consistent, capable of being followed, stable and enforced”. *Ibid.*, at 472 (citing Lon Fuller, *The Morality of Law* (1976)).

content of WTO rule of law may be subject to different conceptions, it seems beyond dispute that the rule of law at the WTO requires the observance of all the basic elements identified above.

2. *Damage to WTO Rule of Law: Dismantling the Uniformity of WTO Rules of Conduct*

The basic requirement of rule of law that laws be generally applicable and not aimed at a particular member of the society is embodied in the uniformity of WTO rules of conduct, a major achievement of the Uruguay Round.¹³⁷ The China Protocol has shattered such uniformity by prescribing a set of special rules that are aimed at one Member only. Should this practice spread to future accessions, e.g., the accessions of major transition economies such as Russia and Ukraine, the WTO would risk reacquiring a fragmented rule structure with all the attendant disadvantages suffered by its predecessor institution.

It should be noted at this juncture that there is an important distinction between rules that are targeted at *one* particular Member and rules that are aimed at a group of unspecified Members. Examples of the latter case include the differential treatment of developing country Members, where special rules apply only to Members with the developing country status, and the Plurilateral Trade Agreements, where the rules apply only to Members that have accepted them. In such cases the rules are not targeted at one particular Member of the WTO. Instead, they are generally applicable to any Member that meets certain predetermined criteria, and therefore are not inconsistent with the basic notion of rule of law.

3. *Other Perils of Member-Specific Rule-making*

The special obligations of China were the result of years of negotiations between China and WTO Members. Apparently, during this process the rule obligations of China were treated very much the same way as its market access obligations: they were bargained for on a country-specific basis and as part of the “give and take” of negotiations.¹³⁸ Thus, in the case of China’s accession, the distinction between WTO rule obligations and market access obligations became blurred.

Rule bargaining on a country-specific basis can have damaging consequences for the WTO rule of law. The power-based bargaining process of accession is bound to produce obligations of the acceding country that cater to the special interests of the powerful. Unlike market access obligations, however, rule obligations favouring particular groups affect WTO law. Such rule obligations may or may not be consistent with WTO principles and may weaken instead of strengthening multilateral

¹³⁷ See Section I.A.2 above.

¹³⁸ See WTO Appellate Body Report, *European Communities—Customs Classification of Certain Computer Equipment*, as note 119 above, para. 109 (speaking of tariff negotiations as “a process of reciprocal demands and concessions, of ‘give and take’”).

disciplines.¹³⁹ Moreover, all special rules aimed at the acceding Member become an integral part of the WTO Agreement. To ensure consistency and integrity of WTO law, member-specific rules must be formulated with special care, but such care is likely to be absent when the rules are haggled over on an *ad hoc* basis and subject to bilateral as well as multilateral bargaining.¹⁴⁰ As demonstrated below, member-specific rule-making has produced WTO-plus obligations of China that do not conform with some of the basic requirements of rule of law.

(a) *Rules that lack clarity and consistency*

Ad hoc rule-making in the accession negotiations does not lend itself well to careful formulation of rules of conduct. Not surprisingly, numerous ambiguities, gaps and inconsistencies can be found in the provisions of the Protocol that attempt to modify or expand existing WTO rules. There are a number of examples in the WTO-plus provisions illustrating such problems. For instance, the Protocol sets out various investment provisions but does not clarify their relationship with the Multilateral Trade Agreements, especially GATT, GATS and TRIMs.¹⁴¹ This contrasts sharply with TRIMs, which clearly defines its application in the context of GATT.¹⁴² Another example is the “equal treatment” clause in paragraph 18 of the Working Party Report, which obligates China to provide the “same treatment” to all Chinese and foreign enterprises and individuals in China without qualification. This clause is not only inconsistent in its format with typical national treatment clauses of the WTO agreements, but also contradicts other parts of the Working Party Report.¹⁴³ Still another example is the judicial review provisions of the Protocol. Instead of simply confirming that China must comply with the existing judicial review provisions of GATT, GATS and TRIPs, the Protocol sets out a general standard for judicial review of administrative decisions without distinguishing whether they relate to trade in goods, services or intellectual property. As a result, it is unclear to what extent the Protocol may have rendered the various differences between the judicial review provisions of these agreements irrelevant to China.¹⁴⁴

¹³⁹ The special trade remedy rules of the China Protocol are such an example. See Section I.C.(3) above. The special antidumping and antisubsidy rules and the special safeguard rules of the Protocol lower the standard of WTO disciplines in these areas and reflect the protectionist interests of the major importing countries.

¹⁴⁰ The negotiations of China's accession, like in other WTO accessions, proceeded on both the multilateral and bilateral fronts. See Jeffrey Gertler, “The Process of China's Accession to the World Trade Organization”, in Frederick Abbott (ed.), *China in the World Trading System: Defining the Principles of Engagement* (The Hague: Kluwer Law International, 1998), p. 68. While the multilateral negotiations at the Working Party worked on drafts of the Protocol and the Working Party Report, and bilateral negotiations between China and its major trading partners focused on market access commitments on goods and services, some of the major provisions of the Protocol were the product of the bilateral negotiations between China and United States. The final version of the Protocol copied, almost verbatim, the text of “Protocol language” of the US–China bilateral agreement concluded in November 1999. Source: USTR, Agreement on Market Access Between the People's Republic of China and the United States of America (15 November 1999).

¹⁴¹ See Section II.E above.

¹⁴² See TRIMs, Articles 1, 2 and 3.

¹⁴³ See Section II.D.3 above, notes 82 and 83.

¹⁴⁴ See Section II.B above.

(b) *Rules that are unlikely to be followed and enforced*

Because WTO-plus obligations were negotiated on a member-specific basis, there was apparently a tendency to bargain for the most stringent rule obligations possible without a proper regard for their practical implications. One example is the requirement that China provide translation of all laws, regulations and measures pertaining to trade issued by all levels of government within 90 days of their implementation.¹⁴⁵ For reasons previously indicated, China has not been able to comply with this extraordinary obligation and probably will not be able to do so in the future. Imposition of rules that are unlikely to be followed and enforced can only reduce the effectiveness of WTO law.

(c) *Rules that are not readily accessible and transparent*

The Protocol incorporates by reference more than 140 paragraphs of the Working Party Report that contain numerous special rule commitments on the part of China. These rule commitments, however, are couched in provisions scattered throughout the 72-page text of the Working Party Report. As a result, it is not easy for the public to identify and keep track of all the special rule obligations of China. This obscure form of publication is a practice inherited from the GATT era. While it provides ample flexibility in formulating country-specific obligations of the acceding country, the practice works to detract from the uniformity and transparency of WTO rules. The problem is only highlighted in the case of China where an unprecedented number of special rule obligations were made and published in the Working Party Report.

As previously discussed, unlike market access obligations, WTO rule obligations are not easily revised.¹⁴⁶ Once enacted, the member-specific rules cannot be changed or eliminated without going through the stringent amendment procedure of the WTO Agreement.¹⁴⁷ Hence, no matter how imperfectly formulated, the special rules are likely to perpetuate within the system.

4. *Potential Constraint on the Dispute Settlement System*

As an integral part of the WTO Agreement, the China Protocol may present a special challenge to the WTO dispute settlement system. In their future adjudication of disputes involving the Protocol provisions, WTO panels and the Appellate Body would be required, in accordance with adopted principles of treaty interpretation, to construe the Protocol language consistently and harmoniously with all other applicable

¹⁴⁵ See Section II.A.3 above.

¹⁴⁶ See Section I.A.1 above.

¹⁴⁷ See notes 7 and 8 above, and accompanying text.

provisions of the WTO Agreement.¹⁴⁸ This, however, is likely to be a very difficult task given the imperfect “legislation” and the absence of any articulated rationale for the special rules of the Protocol.

The potential constraint that the Protocol may impose on the dispute settlement procedure can be illustrated by the following example. As discussed above, while the Protocol has expanded WTO law into a new territory of investment where no legal framework currently exists under the WTO Agreement, it has failed to clarify how these new investment provisions relate to the existing WTO agreements, especially GATT, GATS and TRIMs. As a result, major issues of interpretation may arise, such as the question of whether the exceptions under GATT Articles XX and XXI should apply to the investment provisions of the Protocol. Short of a WTO official interpretation of the provisions,¹⁴⁹ the lacunae created by the Protocol in WTO law would have to be filled through the dispute settlement process. Whereas a certain degree of “gap filling” can be expected of any adjudication system, the DSU expressly mandates that the dispute settlement procedure must not add to or diminish the existing rights and obligations of WTO Members.¹⁵⁰ There have been warnings against the tendency to use the dispute settlement process to fill gaps in the WTO agreements or to set forth new norms that may carry the organization into totally new territories.¹⁵¹ Unfortunately, when called upon to resolve disputes over certain Protocol provisions, the panels and the AB might be pressured to do just that.

The inclusion in the Protocol of the investment provisions and related national treatment provisions appears to be purely the result of negotiations between China and the WTO Members who are also major investors in China. Such investment undertakings and related national treatment obligations of China are neither called for by the Multilateral Trade Agreements nor necessary to enable China to fulfil its general obligations as a WTO Member. While they contribute to liberalization of investment in China, the making of *ad hoc* investment rules has left such gaps in WTO law that it may compel the panels and the AB to create new rules in the adjudication process, a function inappropriate for the dispute settlement system.

IV. CONCLUSIONS AND RECOMMENDATIONS

The China Protocol is the first WTO document that has enacted a set of special rules of conduct for a single Member. These special rules include those that deviate

¹⁴⁸ See WTO Appellate Body Report, *Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R (adopted 12 January 2000), para. 81, which reads in part, “In light of the interpretive principle of effectiveness, it is the *duty* of any treaty interpreter to ‘read all applicable provisions of a treaty in a way that gives meaning to *all* of them, harmoniously.’” (quoting its own report in *Argentina—Safeguard Measures on Imports of Footwear*) (emphasis in original). One commentator is of the view that the Appellate Body expressed the principle of effectiveness over-ambitiously, “since it does not recognize the possibility that disharmony between treaty provisions may exist inherently, however meticulous the interpretive approach”. Lennard, as note 33 above, at 59.

¹⁴⁹ See Article IX:2 of the WTO Agreement.

¹⁵⁰ DSU, Article 3.2.

¹⁵¹ See Jackson, as note 8 above, at 186–187.

from WTO disciplines in trade remedies and those that expand existing WTO rule obligations. The latter category of the special rules, known as the “WTO-plus” rules, prescribes obligations that exceed the existing requirements of the Multilateral Trade Agreements. All of the special rules under the China Protocol have become part of the WTO Agreement.

Despite this significant development in WTO law, the Protocol is conspicuously silent as to the rationale or the purpose and object of its separate set of rules for China. In the case of the WTO-plus obligations, an apparent explanation for their imposition is the special importance of China in world trade. Yet, this unspoken “rationale” raises a fundamental question for the WTO legal system: whether the WTO should establish additional rules of conduct for a particular Member based on the relative importance of its economy.

The WTO-plus rule can have both positive and negative implications for the world trading system. On the one hand, the “plus” rules enhance WTO disciplines by requiring China to adhere to more stringent obligations on the administration of its trade regime (the rule-of-law type of obligations) and on liberalization of its investment measures (the obligations on investment and national treatment of foreign investors). More significantly, they require China to adhere to market economy practice (the market economy obligations), thereby ensuring the compatibility between the Chinese economic system and the WTO. On the other hand, the imposition of “plus” rules on a single Member undermines the WTO rule of law, a concept that has become increasingly important for the rule-based world trading system. The enactment of China-specific rules not only has broken the uniformity of WTO rules of conduct, a significant development of rule of law for the multilateral trading system since the Uruguay Round, but also may pose undesirable constraints on the WTO dispute settlement system. The making of *ad hoc* member-specific rules in the China Protocol has left major gaps and inconsistencies in WTO law, the resolution of which may require the WTO tribunal to engage in “rule-making”, a function inappropriate for it under the WTO constitution. The failure of the Protocol to provide any clear rationale for making the China-specific rules can only exacerbate the problem.

The question then is whether the WTO should impose member-specific “plus” rules at the expense of the integrity of its legal system.¹⁵² The answer may depend on one’s perspective on the future direction of the WTO. Member-specific rule-making through accession, a legacy of the GATT era, can be very effective in inducing specific behaviour of the acceding country. But the notion that the rules of conduct for world trade can be negotiated and established on a country-specific basis is inherently inconsistent with the rule-based WTO system. For those who believe that the world

¹⁵² It should be noted that there is no inevitable “tradeoff” between the positive and negative effects of WTO-plus rules. An acceding country can always enhance the rule of law at home independent of WTO requirements, and liberalize its trade and investment regime unilaterally. In the case of China, massive market-oriented economic reforms had occurred during the two decades before its accession to the WTO.

trading system should return to the more flexible and less rule-oriented GATT approach in order to be effective,¹⁵³ the ability to negotiate rule obligations on a country-specific basis would be highly desirable. However, for those who believe that the future of the world trading system lies in the rule of law rather than the rule of power, maintaining the integrity of the WTO legal system would be far more important than securing whatever additional trade benefit the member-specific “plus” rules may generate (as compared to the benefit to be brought about by the standard WTO rules).

If the long-term interest of the world trading system can be better served by strengthening the rule of law at the WTO, the current WTO accession practice should be reformed.¹⁵⁴ And the reform should be initiated now, while dozens of countries, including major transition economies such as Russia and Ukraine, are still waiting to join the WTO.¹⁵⁵

Currently, WTO-plus or other special rule obligations can be imposed on a particular acceding Member because Article XII of the WTO Agreement does not place any limit on the terms of accession to be negotiated between the acceding country and the WTO. The pertinent provision of Article XII, which essentially follows the language of GATT Article XXXIII, has proven to be a loophole in the rule-based WTO system. Under the unlimited mandate of this provision, the WTO rules of conduct can be altered with respect to any particular acceding Member whenever the major trading powers dominating the negotiation process demand country-specific rules. To close this loophole, it would be necessary to amend Article XII, a process certain to be fraught with difficulty in light of the rigid procedures for amending the WTO Agreement and the lack of representation of the applicant's interest at the WTO.¹⁵⁶

Short of a formal amendment to Article XII, an alternative would be for the WTO to adopt certain guidelines for its accession practice.¹⁵⁷ Guidelines concerning

¹⁵³ See, e.g., Claude E. Barfield, *Free Trade, Sovereignty, Democracy: The Future of the World Trade Organization*, 2 Chi. J. Int'l L. (Fall 2001), 408, expressing the view that “the new ‘judicialized’ WTO dispute settlement system is substantively and politically unsustainable” and that “alternatives should be pursued that will reintroduce some of the former elements of ‘diplomatic’ flexibility that characterized the earlier GATT regime.”

¹⁵⁴ For comments and recommendations relating to reform of WTO accession practice with respect to transition economies, see Polouektov, as note 91 above, at 34–37.

¹⁵⁵ As of December 2002, the following countries were in the process of negotiating their accessions to the WTO: Algeria, Andorra, Azerbaijan, Bahamas, Belarus, Bhutan, Bosnia and Herzegovina, Cambodia, Cape Verde, Kazakhstan, Laos, Lebanon, Nepal, Russia, Samoa, Saudi Arabia, Seychelles, Sudan, Tajikistan, Tonga, Ukraine, Uzbekistan, Vietnam, Yemen, and Yugoslavia. See WTO, List of applicants to become WTO Members, available at <www.org/english/thewto_e/acc_e.htm>.

¹⁵⁶ Under Article X of the WTO Agreement, to effect an amendment to Article XII would require: (i) a Member to submit a proposal for amendment to the Ministerial Conference, (ii) a decision by the Ministerial Conference taken by consensus to submit the proposed amendment to the Members for acceptance (if no consensus is reached, the Ministerial Conference will decide by a two-thirds majority of the Members whether to submit the proposal for acceptance by Members), and (iii) the acceptance of the proposed amendment by two-thirds of the Members. If the amendment is considered “of a nature that would alter the rights and obligations of the Members”, it will take effect only for those Members that have accepted them. Otherwise the amendment so accepted will bind upon all Members. See Articles X:3 and X:4 of the WTO Agreement.

¹⁵⁷ A decision to adopt the guidelines for accession practice may be made by the Ministerial Conference or the General Council by consensus or, if no consensus can be reached, by a majority of the votes cast. See Article IX:1 of the WTO Agreement.

“WTO-plus” obligations might be formulated along the line of the following recommendations:

(1) As a matter of principle, “WTO-plus” obligations should not be imposed on any particular acceding Member. Specifically, an acceding Member should not be required to make rule commitments that are more stringent than the requirements of the Multilateral Trade Agreements in effect at the time of its accession.

(2) If the special circumstances of a particular acceding country ever warrant a departure from the above principle, the reasons for such departure should be expressly explained in its accession protocol or the related working party report. Furthermore, the accession protocol should make it clear how a particular “plus” obligation relates to the relevant standard rules of the Multilateral Trade Agreements. An explicit explanation would not only guide the panels and the Appellate Body in their adjudication of disputes involving interpretation of the “plus” rule but also help to ensure a better implementation of such “plus” rule.

(3) If an acceding Member wishes to undertake voluntarily rule obligations in new areas not covered by the existing Multilateral Trade Agreements (e.g., general undertakings on investment measures), such obligations should be documented separately under its accession protocol as “unilateral undertakings”. Because such unilateral undertakings are in nature akin to the obligations undertaken under the Plurilateral Trade Agreements, they should be treated similarly within the WTO legal framework. Like in the case of the Plurilateral Trade Agreements, the applicability of the DSU to the unilateral undertakings should be subject to a separate decision by the Member bound by such undertakings, i.e., the acceding Member.¹⁵⁸

(4) Procedurally, all provisions containing special rule obligations of the acceding Member should be compiled and published in a centralized and systematic manner rather than being left in the obscure text of the working party report. This can be done, for example, by documenting all special rule commitments of the acceding country in an appendix to the accession protocol. Such a simple change in procedure could go a long way in helping to ensure complete accessibility and transparency of all special rules of the WTO to the public and in improving the quality of WTO rule-making.

Member-specific rule-making is a legacy of GATT, inherently inconsistent with the WTO rule of law. The WTO-plus obligations of China may be unique in scope and scale, and the Chinese government has accepted such obligations apparently for its own policy reasons. The case of China’s accession, however, highlights the tension between a generally rule-based WTO system and its power-based accession regime. While the world trading system has moved into a new era of international rule of law, its accession regime remains in the GATT age, still indulging in *ad hoc* country-specific

¹⁵⁸ Appendix 1 of the DSU notes “The applicability of this Understanding to the Plurilateral Trade Agreements shall be subject to the adoption of a decision by the parties to each agreement setting out the terms for the application of the Understanding to the individual agreement, including any special or additional rules or procedures for inclusion in Appendix 2, as notified to the DSB.”

rule-making unguided by clear principles and unchecked by duly established procedures. This internal inconsistency will inevitably work to impede the effective functioning of the WTO system. Hence, WTO Members would be well advised to consider carefully the systemic implications of the issues raised by the China Protocol before embarking on further country-specific rule-making in future accessions.