PREPARING CHINA FOR ITS WTO ACCESSION

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Introduction

The recent accession of China to the World Trade Organization (WTO) has generated extensive discussion and assessment of its implications on the international trade regime and on the Chinese political and legal systems.1 It is hardly overstating the case to assign such a degree of magnitude to the potential impact on China and indeed the global economy. However, although it may be argued that China's accession per se evidences its firm commitment to market-orientated reform and governance based on the rule of law, much attention has been paid to China's willingness and capability of fulfilling its WTO duties and commitments in the future. More specifically, commentators are divided. Some doubt that

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China will seriously perform its WTO duties; some believe that according to its track record China will honour its international obligations; and still more anticipate a scenario of "one step forward but two steps back" in its course to join the international market. The issues are further clouded by domestic officials openly admitting that China is not ready for WTO accession.

China's commitments have been stipulated in the Protocol on the Accession of the People's Republic of China and the Schedules Attached. Given the complexity of China's current situation and the early stage of its WTO entry, it seems premature to make any precise judgements as to the strictness of China's compliance with the WTO rules. This article does not intend to examine these obligations in detail, nor probe into associated concerns, but rather it highlights the latest developments in China which reflect the government's efforts to prepare the country for WTO membership. It will also briefly analyse some of the difficulties that have arisen.

Legislative Reform

The most significant precursor to China's WTO entry is bringing the current domestic legal regime (particularly foreign trade and investment legislation) in line with that contained within the WTO rules. In March 2000, China presented to the "Working Party on the Accession of China" a list of 177 items of central legislation that would need to be revised. In November of the same year, the Chinese Government notified the China Working Group of the WTO that 38 had so far been amended and at

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2 Greg Mastel, "China and the World Trade Organization: Moving forward without Sliding Backward" (2000) 3 Law & Policy in International Business 997, states that China's government control, local protectionism, state-run enterprises, combined with lack of rule of law could prove too much for the WTO. Inability to police China could be a damaging blow to the credibility of the WTO.


6 The Protocol and the Schedules are published in WTO Bureau of the MOFTEC (compiled), Compilation of the Legal Instruments on China's Accession to the World Trade Organization (Beijing: Legal Press, 2002).
the same time promised to revise a further 38 national laws and 120 administrative decrees. On the eve of its accession, China further committed itself to amend over 2000 national regulations in order to ensure the compliance of the Chinese legal system with WTO principles and agreements.

Since the year 2000, at least eight national laws directly concerning foreign trade and investment have been amended. Among them, the revision of the three foreign investment enterprise laws directly concerns foreign investors the most. In October 2000, the Sino-Foreign Contractual Joint Venture Law and the Wholly Foreign-Owned Enterprise Law were amended by the Standing Committee of the National People’s Congress (SCNPC). In March 2001, the National People’s Congress (NPC) revised the Sino-Foreign Equity Joint Venture Law. Given that these three enterprise forms had been major foreign investment vehicles since the late 1970s, their amendment represented an important step in aligning China’s foreign investment regime with the WTO rules.

The changes brought about by the amendments primarily focus on four areas:

1. The requirement for foreign investment enterprises to balance their foreign exchange accounts by themselves was deleted. Previously, a foreign investment enterprise had to use its own foreign currency to purchase its equipment and materials from the international market. As such, the law mandated export, since the renminbi is not a convertible currency and domestic sale

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8 See the report at http://finance.sina.com/g/20010913/107284.html.
10 For detailed explanations of these revisions, see Explanations of Draft Amendments of Sino-Foreign Equity Joint Venture Law, Sino-Foreign Contractual Joint Venture Law, and Wholly Foreign-Owned Enterprise Law by Mr Shi Guangsheng as the Minister of the MOFTEC to the Standing Committee of the National People’s Congress (SCNPC) on 23 October 2000. Printed at (2000) 6 Zhonghua Renmin Gonghegu Quanguo Renmin Daibiao Dahan Chungguo Wenyuanhui Gonghang (Bulletin of the SCNPC), pp 646–649.
cannot generate any hard currency. According to Article 2 of the Agreement on Trade-Related Investment Measures (TRIMs), a member of the WTO is prohibited from restricting enterprises by measures of foreign exchange balance.\textsuperscript{11} Moreover, the progress made in 1996 to make the renminbi convertible in current accounts has paved the way for further relaxation of the foreign exchange controls.\textsuperscript{12}

2 The elimination of the mandate to foreign investment enterprises to, as much as possible, purchase their materials, fuel or equipment in China. The mandate had directly conflicted with a WTO rule disallowing members from compelling enterprises to purchase or use local products.\textsuperscript{13}

3 The growing development of a free-market economy in China coincided with government moves to relax controls over foreign investment enterprises' operations. As a result, these enterprises are no longer required to report their production and operational plans to the state authority as provided under the old laws.

4 The legal obligation of wholly foreign-owned enterprises to export their products was repealed. Under Article 3 of the old Wholly Foreign-owned Enterprise Law, one of the conditions to establish a wholly foreign-owned enterprise in China was to export all or most of its products. The contradiction of the rule with Article 2 of the TRIMs preventing a member from imposing conditions on quantity, volume or percentage of enterprises' exports obliged the Chinese Government to revoke it so that it might honour its commitments to the WTO.

The Standing Committee also revised the Law on Import-Export Commodity Inspection in April 2002.\textsuperscript{14} One notable change is the partial privatisation of commodity inspection. Under Article 25 of the old law, commodity inspection was provided as part of the supervisory and

\textsuperscript{11} Art 2 of the Illustrative List as the Annex to the TRIMs.
\textsuperscript{12} Renminbi held in current accounts became convertible under the Foreign Exchange Regulation of the PRC of 1996 as amended in 1997.
\textsuperscript{13} Art 1 of the Illustrative List as Annex to the TRIMs.
administrative mechanism. Article 8 of the amended law now treats the inspection more like a business, stipulating that institutions of inspection which are permitted to do so by the state authority may be entrusted by interested parties or foreign institutions of inspection to engage in the business of import-export commodity inspection. The new Article 28 imposes a legal duty on the state inspection authority to handle the petition against the inspection results in a timely manner. The new Article 29 permits a party who disagrees with the result of the review or who is subject to further administrative penalties to challenge the state authority by filing a lawsuit with the People’s Court (PC). Under Article 32, an entity or individual is entitled to complain about, or simply report any violation committed by, the state inspection authority or indeed any officer.

Despite a dynamic campaign to amend the laws, the task is apparently not yet complete. According to the NPC, to fulfil China’s WTO commitments, many more laws will need to be amended within the next three years. These include the Law of Foreign Trade, the Law of Import-Export Animal Inspection, and the Insurance Law. Some new laws such as an Anti-Trust Law should also be adopted.15 In revising the current Foreign Trade Law, there will not only be significant changes in the current provisions on market access, foreign trade entities and qualification, and state control, but also the introduction of new mechanisms such as the investigation of trade barriers and the establishment of free trade areas with other countries or regions.16

In addition to the trade and investment laws mentioned above, further amendments may prove necessary. For example, China’s WTO membership may lead to constitutional amendment. As some scholars have already noted, the current Constitution fails to provide clear rules to apply international conventions or treaties to domestic legal proceedings. Certain constitutional provisions may not facilitate, or indeed prevent, the fulfilment of China’s WTO obligations. This

15 See the report in Zhongguo Zengqian Bao (China Securities), 29 Mar 2002.
is true in the case of a potential conflict between a citizen's constitutional duty to safeguard national secrets and the WTO's principle of transparency.17 Moreover, the establishment of an independent judicial review mechanism as promised by the Chinese Government needs further institutional support, particularly the breakthrough in development of substantive standards of impartiality and independence.18

Another candidate for change would be the newly adopted Law of Legislation, which only allows government organs, organisations and citizens to participate in the legislative process. The Law requires the legislature concerned to solicit institutional and citizens' opinions. Foreign businessman, as non-citizen individuals, are not included.19 However, under the Protocol of the China Accession, the transparency principle will entitle, in addition to WTO members and enterprises, any individual (including non-Chinese nationals), to comment on the trade measures to be adopted.20 Recently, the draft Law of Administrative Permission has been completed. It is intended to restrain government authorities and to develop a business-enabling environment. The draft Law identifies 11 areas where business activities may be subject to government approval and sets out legal liabilities against abuse, corruption and negligence on the part of the government officials granting permissions. In addition, certain business operations are exempt from government approval and instead, market competition, legal proceedings, industrial or service standards and professional intermediaries are expected to play important roles in maintaining the market order.21

Judicial Reform

China's implementation of the WTO rules will seriously test the qualitative function of its judicial system. Opening China to the world means

17 For a recent discussion, see Wang Lei, "Rushi yu Zhongguo Xianfa" (Accession to WTO and the Constitution of China) (2002) 2 Zhongshu yu Fa (Political Science and Law), pp 28-32.
19 See Arts 35 and 58 of the Law.
20 See Art 2(3) of Part 1 of the Protocol.
21 See the report in Zhongguo Qingshui Bao (Youth Daily of China), 15 Nov 2001, p 1; also see China Economic News (No 48), 10 Dec 2001, pp 1-3.
not only more trade and investment transactions, but also inevitably more disputes. Between 1979 and September 2001, PCs at all levels have adjudicated 23,340 cases involving foreign parties, including parties from Hong Kong, Macao and Taiwan. These cases have provided the PCs with a much-needed opportunity to learn how market disciplines function and to gain experience from the trial practice. However, neither domestic nor foreign professionals are satisfied with the performance of the PCs thus far. As Mr Xiao Yang, the President of the Supreme People's Court (SPC), pointed out, effective enforcement of the WTO rules in China may be challenged by local protectionism, judicial corruption, the uneven quality of the judiciary, and an outmoded ideology. Foreign experts have also complained of biased adjudication and have experienced extreme difficulty in enforcing judgments even when in foreign litigants' favour.

Against this backdrop, attempts to streamline the judicial system have focused on the key areas discussed below.

Legal Interpretations
The SPC has systematically reviewed and examined all its legal interpretations. Although such a judicial practice may lack a constitutional basis, the rapid development of a market economy in China alongside defective legislation have forced the SPC to deal with the issues now being raised. Such issues cannot be resolved through the judicial interpretation of existing enactments, as they have been in the past. Interpretations were formerly issued in both formal interpretations of national laws as well as less formal policies, opinions, notices, and replies to the inquiries of the lower courts. In the half-century since the

25 Neither the Constitution of the PRC, nor the Law on Legislation of the PRC mentions such a power that the SPC has been exercising for a long time. Art 33 of the Organic Law of the People's Courts of 1979 as amended in 1983 only permits the SPC to interpret laws and decrees when there are issues concerning their concrete application in trials.
establishment of the People's Republic of China, 2000 such documents have come into being. In the course of China's negotiations for its WTO membership, the SPC joined the efforts of other branches of the government to sort out its past interpretations in accordance with the WTO rules and China's commitments. By early November 2001, 1,226 pieces had been verified under the principles of the Constitution of China and the WTO rules and as a result, 106 have been repealed.26

Jurisdiction over Foreign Interests
The jurisdiction over cases concerning foreign interests has been restructured. To improve the trial quality of such cases after China's accession to the WTO, the SPC promulgated the Provisions on Certain Issues Concerning the Jurisdiction of Civil and Commercial Cases Involving Foreign Interests on 1 March 2002 with immediate effect. According to the Provisions, the PCs permitted to hear foreign interest cases, which included cases concerning parties in Hong Kong, Macao and Taiwan, at first instance are limited to five categories:

1. PCs at any economic and technology development zones approved by the State Council;
2. intermediate PCs in the capital cities of provinces, regional national autonomies and the municipalities directly under the central government;
3. PCs at any Special Economic Zones and cities whose budgets are separately listed in the State Council plan;
4. other intermediate PCs designated by the High People's Courts; and
5. all the High People's Courts.27

Essentially, this restructuring removes the jurisdiction of most foreign related cases from the lower PCs. In so doing, it apparently aims to

26 The speech made by Mr Li Guangguang as the Vice President of the SPC on 20 Nov 2001, printed by the Political Bureau of the SPC (in 23 above), pp 23-24.
28 Art 1 of the Provisions.
avoid the associated influence or interference of local governments and assigns these cases to better-qualified and more experienced judges. In the long term, this might be considered as a step towards establishing a centralised national judicial system.\textsuperscript{20}

Nevertheless, such jurisdictional reform does not apply to all foreign related cases. According to the Provisions, the PCs identified above may only accept at first instance contract and tort cases, letter of credit cases, disputes over recognition and enforcement of international arbitral awards, disputes over the validity of arbitration agreements in civil and commercial transactions, and applications for recognition and enforcement of foreign judgments in civil and commercial matters. Other disputes, such as those arising from border trade, real property, and intellectual property disputes involving foreign parties are not subject to the new arrangement. The reform apparently tries to strike a balance between improving trial quality and maintaining an acceptable workload for upper level courts.

**Quality of the Judiciary**

Great efforts are being devoted to improve the quality of the judiciary. In June 2001, the Law on Judges of 1995 was amended. According to the new law, to become a judge, all candidates must now take and pass a national judicial examination.\textsuperscript{12} Meanwhile, more rules governing judicial ethics and disciplines were also introduced.\textsuperscript{31} Moreover, the PCs at different levels have so far sent over 200 judges to study in foreign jurisdictions. At least 100 have now returned and since been promoted to posts with greater responsibilities.\textsuperscript{12} According to a national plan, within the first 10 months of 2002, a series of training programmes on

\textsuperscript{20} Under the current legal regime, all local PCs are subject to local governments at the same level in both personnel and financial matters. Judges are appointed by the local people's congress and the allocation of an annual budget to the judiciary is decided by the local government. Consequently, local governments may easily insert their influence, if not full control, over the local judiciaries in their administration. This is often viewed as the major reason PCs are so involved in serious local protectionism and corruption. To combat the problem, a proposal has been made to reform the present system by introducing a centralised judicial system. Cao Jianming (ed), WTO yu Zhongguo de Fa Fa Shengfan (WTO and Judicial Trials in China) (Beijing: Legal Publishing House, 2001), pp 268–269.


\textsuperscript{11} See Art 5, 15, 24, 32, and 40 of the Law (n 30 above).

\textsuperscript{12} Xiao (n 23 above), p 7.
the WTO legal regime will train 800–1000 selected judges in Beijing and at the same time more judges will be sent to the United States of America (US), European countries and the Hong Kong SAR to engage in further study.\(^{13}\)

**Administrative Reform**

As compared with the legislative and judicial branches, the greatest challenge to China's entry into the WTO has so far been the Chinese government itself, which at one time had complete dominance over all respects of national life. In terms of governance change, China's accession to the WTO is considered the beginning of a new and significant change, even a revolution greater in impact than the economic reforms witnessed since the late 1970s. Accelerated development of a market economy in China will inevitably reshape government functions, structure, mentality, legislative power and raise the quality of its officials.\(^{14}\)

When negotiations between the WTO and the US concluded in 1999, they cleared the way for China's WTO accession. Since then, the State Council has led the government campaign to systematically review and examine all existing administrative enactments. Premier Zhu Rongji announced in his working report to the NPC in March 2002 that such comprehensive verification had been completed by and large.\(^{15}\) The result of the verification is reflected in the State Council Decision on Repealing Certain Administrative Decrees and Regulations Issued before the End of 2000, dated October 2001. According to the Decision, among 756 decrees and regulations of the central government subject to the examination, 71 were abolished for conflicting with the new conditions and 80 were repealed because they were now obsolete.\(^{16}\)

\(^{13}\) Li (n 26 above), p 25.


Amendments, Enactments and Abolitions

The comprehensive scrutiny reaches every ministry or commission under the State Council. For example, the State Planning Commission has abolished 124 of 341 provisions subject to the review. The Ministry of Foreign Trade and Economic Cooperation (MOFTEC) had, by the end of March 2002, repealed 381 pieces of its provisions which were found to not conform with WTO rules and further annulled 178 internal policy documents.

In addition to reviewing the existing administrative enactments, the exercise of government rule-making power in the future has been streamlined. On 26 November 2001, the State Council promulgated the Regulations on Procedure of Administrative Decree Enactment and Regulations on Procedure of Administrative Provision Adoption, which will govern the rule-making of the State Council and different ministries or commissions respectively. In following the WTO principles, these Regulations place great emphasis on not only transparency and public participation, but also on the transformation of government function; the simplification of administrative procedures; the protection of the lawful rights and interests of individuals and entities; and balancing government powers with its responsibilities. In this regard, although there is a long way to go to reform the administrative system and to bring it in line with the WTO rules, the development does reflect the government's efforts to improve its way of governance and to rely more on the legal provisions.

In the course of making the foreign trade system of China compatible with WTO rules, certain recent enactments were legislated and are worth greater attention at this point. In line with the amendment of the Law of Sino-Foreign Equity Joint Ventures, the State Council carried out an overhaul of its Implementing Provisions of the Law, which set forth much more detailed rules to provide the general principles of the

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law with more meaningful effect. The amendment saw at least 19 deletions of various restrictions and more than one-third of the rules change. For example, a number of requirements of entrance qualifications, such as the capacity to export their products and to introduce modern technology and management schemes, no longer exist. Moreover, requirements and procedures of government control over joint ventures and mandates on opening accounts with domestic banks have been abolished. As such, restrictions on business operations of joint ventures are relaxed. Earlier, on 23 April 2001, the MOFTEC had also amended the Detailed Implementing Provisions of Wholly Foreign-Owned Enterprise Law. Joint venture and wholly foreign owned enterprises are two major vehicles of foreign investment. Together with the reform of joint venture regulations, the rules governing wholly foreign owned enterprises have also changed.

Another very important enactment is the revision of the Guiding Catalogue of Industries for Foreign Investment and the Provisions on Guiding the Direction of Foreign Investment. Indeed, this is the second time it has been revised since it was promulgated in 1995. In the course of negotiating its WTO accession, the Chinese Government first amended the Catalogue at the end of 1997 hoping to show its willingness to further open up to the world. However, the attempt was considered disappointing for failing to meet the expectations of foreign investors and professionals. The latest revision, according to state officials, aims less at displaying willingness, and more at bringing China’s foreign trade regime in line with its WTO commitments. The Provisions continue as they have always done to classify foreign investment projects into encouraged, allowed, restricted and prohibited categories. However, under the new Guiding Catalogue, the number of encouraged areas has been increased from 186 to 262 and the restricted areas reduced from 112 to 75. Moreover, many restricted areas, particularly service industries, are now permitted increased equity interests, have fewer geographical restrictions and greater financial autonomy. Finally, they also have the

[89] The Law has only 16 short articles. As a result, what it provides are only general, or even vague, principles. To provide some remedies, the State Council further adopts the detailed implementing provisions with 105 articles.

timetable for change to carry out China's obligations under the WTO. Certain prohibited areas under the old provisions are now being opened to foreign investors for the first time, such as specified telecommunications projects and urban utility supply projects. Lastly, the structure of the Guiding Catalogue has been simplified. The previous Catalogue divided restricted areas into A and B groups, each subject to different approval procedures according to the size and sensibility of the project concerned. The new revision removes this division.  

In addition to the new enactment and amendments mentioned above, plans to update more regulations on foreign investment have recently been revealed by the state authorities. For example, the authorities are actively drafting the following:

1. Provisional Measures of Administration of Foreign Investment Enterprises;
2. Approval Procedures of Sino-Foreign Securities Companies;
3. Provisions on Purchase of Shares or Assets of Domestic Companies by Foreign Investors; and

Certainly, the amendments and new enactments, as part of implementing the commitments to China's accession to the WTO, have improved the Chinese foreign investment regime by broadening the scope of investment opportunities and reducing government control. However, some experts view these developments with extreme caution. They believe that foreign investors should not expect major change unless the government overhauls the regime and fully carries out its WTO obligations.

41 See the report on the new policy of foreign investment, Jinrong Shihao (Financial Times), 22 Mar 2002, p 1.
Restructuring the MOFTEC

In terms of reforming the government structure and function, the MOFTEC provides a leading example. Upon China's accession to the WTO, the ministry was restructured. As a result, three new bureaux were established:

1. The WTO Bureau is now responsible for dealing with the WTO and any new negotiations taking place within its framework;
2. The WTO Information and Consultation Department was created in order to fulfil China's duty under its Accession Protocol to establish an inquiring point; and
3. The Bureau of Import-Export Fair Trade now handles cases relating to domestic and overseas anti-dumping, anti-subsidies and other safeguard measures.

These new establishments have provided the institutional basis to fulfilling the WTO obligations that China has undertaken and which are now starting to function in practice. By the end of February 2002 – the month that the WTO Information and Consultation Department began operating – the bureau had handled 260 inquiries and 212 had been replied to in writing, 95 per cent of which were within 30 days.

Reducing Approval Procedures

Another important aspect of changing the government function in a market economy is to reduce its control over market players. In the course of China's accession to the WTO, different government authorities identified over 2000 matters that were subject to government approval and later more than 1000 such approval procedures have been de-listed by a Task Force Group of the State Council. This will ultimately lead to their removal. Upon China's accession, the State Commission of Planning declared the first batch of abolished approval procedures in five business areas, including (but not limited to):

44 see the report in Renmin Ribao (People's Daily), 1 Nov 2001, p 2.
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1. projects of urban infrastructure;
2. certain facets of agriculture and forestry;
3. local social development;
4. real development; and
5. trade facilities.

Price Controls and Tariffs
Many procedures remaining in force detailing state price controls have been reduced massively from 141 in 1999 to 13 by 2001.\footnote{For a more detailed report and analysis, see \textit{China Economic News} (No 48), 10 Dec 2001, pp 1-4.} This reform will clearly limit the government's intrusive administrative powers; produce more market independence and autonomy; streamline domestic practices with WTO principles; and promote a new style of governance by relying more on market-based discipline. Similarly, upon its accession to the WTO, China had further lowered the average level of its tariffs from 15.3 per cent to 12 per cent, tariffs which affect 73 per cent of China's 5300 commodities.\footnote{See the report of the Xinhua News Agency on 11 Dec 2001, available at http://people.com.cn/GB/jinji/20011211/624664.html.} Then, early in 2002, the Chinese Government declared that in implementing its WTO obligation to reduce tariffs, the average rate would be further reduced to 10 per cent by 2005.\footnote{See the report of Beijing Qingshan Bao (Beijing Youth Daily), 10 May 2002, p 2.} Despite the repeated reduction in recent years, compared with the average tariff level of approximately 3.5 per cent in developed countries, the Chinese tariff rate still sounds high. On the other hand, a developing country may still use tariffs as a means of protecting domestic industry in the near future, particularly in some sensitive sectors, such as the auto industry, telecommunications and high-tech equipment.

External Impacts of Accession

Beyond accelerating domestic reform, preparing China for its WTO membership has also produced immediate international and regional impacts. It is believed that China's membership will structure a new balance of power within the WTO and help to focus its attentions on
developing countries. The government has consistently suggested it hopes to play an active role in the WTO amid the next round of negotiations. In his first public speech at the WTO since China joined the organisation, China’s Representative to the WTO, Sun Zhenyu, attacked richer members by saying that the interests and requests of developing countries had not been adequately taken into consideration, nor had they been ensured in the long term. According to Sun, such attitudes were irresponsible and unfair and one of the major causes for widening the gap between the rich and the poor. At the same time, the MOFTEC in Beijing declared China’s position in the new round of trade negotiations known as the Doha Development Round: “China as a member of the developing camp will co-operate with other countries to establish a new international trade order, which should be fair, just, and reasonable for striking a balance of interests between developed and developing countries, particularly promoting the economic development of developing countries.”

Immediately after completing its accession procedures, China began actively seeking the establishment of a free trade area with the ASEAN within 10 years. At the same time, mainland China and the Hong Kong SAR began their official consultation in January 2002 to develop arrangements of closer economic and trade relations between them. Given that both are members of the WTO, one of the agreed principles governing any new arrangements is compliance with the WTO rules. This pledge, despite reflecting China’s position to honour its WTO

54 At the first official meeting, five principles were established to govern the arrangements to be established: (1) compliance with the WTO rules and the “one country, two systems” principle; (2) mutually beneficial trade liberalisation; (3) progressive consultation starting with less difficult areas; (4) wide consultation with political, business and academic communities; and (5) taking forward the proposals to achieve continuous progress. See the report in Ming Pao (Hong Kong), 26 Jan 2002, A2.
obligations, will be subject to political uncertainties and legal difficulties, because the terms of the relevant WTO rules require local integration arrangements not only to cover substantially all the trade areas, but also not to raise trade barriers to the trade of other members. In the longer term, China has indicated that the establishment of such arrangements may be just the first step towards developing a larger trade bloc of Greater China, including Macao and possibly Taiwan later.

Actions against Unfair Foreign Competition
The external impacts of China's accession to the WTO are further evidenced by its aggressive recourse to the WTO rules to safeguard the interests of Chinese enterprises against international competition. Upon its WTO entry, the Chinese Government repealed its Regulation on Anti-dumping and Anti-subsidies of 1997 and promulgated on 26 November 2001 a new set of rules in their place, including the Regulations on Anti-dumping, the Regulation on Anti-subsidies, and the Regulation on Safeguard Measures. The rules have since been put to good use. In the first four months since their enactment, the MOFTEC initiated seven anti-dumping investigation proceedings, accounting for approximately 40 per cent of all such investigations since China's first use of the legal method in 1997. More cases in this area are expected in future.

55 Unlike the WTO rules which are clear and binding and further supported by the understandings and decisions of dispute resolution within the GATT/WTO framework, the "one country, two systems" principle has been considered a statement of goals rather than a governing model. Anna M. Han, "Hong Kong's Economy under Chinese Rule: Prosperity and Stability?" (1998) 22 Southern Illinois University Law Journal, p 328. In particular, its meaning in economic integration of the two sides has never been well defined. Thus, the economic and trade development and co-ordination of the two sides often have to depend on the governmental dealing on a case-by-case basis and sometime even on certain leaders' words. Therefore, to what extent the certain WTO rules and the less certain "one country, two systems" principle may satisfactorily work together will pose a challenge to the success of the arrangements. See Xian Chiu Zhong, "Zhongguo Guangming Jingnian Gujiu Aquip Chuan (Probing into the Arrangements of Closer Economic and Trade Relations between mainland China and Hong Kong)", paper presented at the Conference on Free Trade Area: Legal Perspective at the University of Hong Kong on 26 Mar 2002.
56 See Art 24(4) of the GATT, Understanding on Interpretation of Art 15 of the GATT 1994, and Art 5 of the GATS.
57 See, eg Mr Long Yonggu, the Vice Minister of the MOFTEC stated on 28 Nov 2001 in Hong Kong that Taiwan might not join the free trade arrangements because it did not have direct communications with the Mainland yet. The report is available at http://www.chinamtdobank.com/Inshin/Text.
Some Chinese experts argue that the surge in the number of anti-dumping investigations in China has nothing to do with local protectionism amidst moves to encourage a free-market economy. They claim that since China is a member of the WTO, it shall bear its obligations and at the same time should be entitled to exercise its rights to protect its own lawful interests.  

Since 1979 when the open-door policy was implemented in China, 480 anti-dumping cases and other safeguard measures have been launched against Chinese enterprises and goods with an approximate import value of US$10 billion in foreign countries. Against this backdrop, the MOFTEC has tried extremely hard to encourage the relevant enterprises to participate in foreign proceedings and defend themselves by adopting administrative decrees and organising trade associations. Their efforts have resulted in a success rate of 37.5 per cent in their investigation of all foreign proceedings; whereas in the past, many failed to answer to charges brought against them and thus gave up on the overseas market.

Recently, the safeguard measures adopted by the US against major steel exporting countries have triggered trade tensions between the US, on one side, and EU member states, Japan and China on the other. China has made it clear that although the US Government has expressed its willingness to compensate Chinese steel manufacturers, China will still take the matter to the WTO dispute resolution mechanism. By treating the case as its first battle in the WTO, success in this instance is particularly important, in order that a favourable precedent is established. In line with government policy, Chinese enterprises are also taking a more pro-active attitude to seek remedies through legal proceedings. In April 2002, the largest Chinese manufacturer of car windshields lodged an appeal in the US International Trade Court against the US Department of Commerce's ruling in February 2002 that the company was dumping its products on the American market. According to Mr Cao De-Wang,

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59 See the report in Fazhi Ribao (Legal Daily), 30 Mar 2002, p 1.
the Chairman of the Board of the company, the appeal aimed more at avoiding the unfair precedent against a national industry than protecting its own interests.61

Continuing Challenges and Problems to Be Solved

The efforts and progress made in a relatively short period are no doubt impressive, particularly when considered against the reform measures carried out in the last two decades. WTO accession has clearly accelerated the pace of market development and deregulation. However, the full implementation of WTO obligations in socialist China is also facing challenges and difficulties. Clearly the further reforms develop, the more difficult it will be to overcome political sensitivities and progress. This article will highlight some of the most important concerns.

The first and foremost issue is the potential to develop the rule of law, which is crucial for the political and economic future of China.62 The GATT / WTO regime is firmly founded on the rule of law and consists of equal application of laws, transparency, predictability and enforceability.63 In the course of economic reform in the past two decades, China’s legal modernisation is considered “an event of epic historic proportions. No other major modern society has endeavoured in so short a time to reconstruct its legal system in so extensive and novel a fashion.”64 However, the dynamic reform has not changed the fundamental belief of the Communist Party of China (CCP) and the government in the function of law as merely a means to achieve state control and policy, known as “instrumentalism”.65 With this approach, the CCP and

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65 In this regard, there are a large number of publications. For a recent one, see Randall Peerenboom, “Ruling the Country in Accordance with Law – Reflections on the Rule and Role of Law in Contemporary China” in Keller (in 63 above), pp 182-190.
the government have been struggling to find a way between justifying the legality of its governance and ultimate authority by formal legislation and, at the same time, improving China’s market environments by introducing modern legal institutions into China.  

To further see through the problem, it should be noted that this legal instrumental approach to legality roots in the political ideology that has existed in China for decades that the CCP’s leadership cannot be challenged. As such, China’s WTO entry may become a new source of tension, at least in the short term, for the Chinese leadership to live up to its WTO commitments. As some expert pointed out, China’s full compliance will depend on whether China can change its political economy rapidly enough before the WTO provisions come fully into effective within five years of its accession. However, it seems not clear whether the CCP and the Chinese Government fully commit themselves to this new orientation. Prior to the China’s accession, some senior official, in addressing the WTO’s challenge, stated that “the WTO was merely a trade organization. Although it may have implications in many respects, not everything can be connected with it.” He further warned that there was “a present abnormal phenomenon”, namely, politicising the WTO (accession). In a recent interview, Mr Xiao Yang, while discussing further reform measure, emphasised the basic principle in the reform that judges and the court cadres should still be controlled by the CCP and the “strong political quality” as the first standard in judge selection as compared with professional competence and ethics.

Such difficulty has been well foreseen by both foreign and domestic scholars. As Professor Zhou Hanhua of the Public Centre of the Chinese Academy of Social Sciences (CASS) held, despite the great efforts,

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66 Afford (n 63 above), pp 221–227.
67 Fewsmith (n 1 above), pp 588–589.
68 The speaker’s name is not disclosed; but given that it was first published in Giaoe Mexican (Internal Reference of Reform), an internal journal circulated among senior officials of the CCP and the government, it was apparently made by a ranking cadre. The abstract is printed in Wang Limin and Others (eds), Zhongguo Jingji Dalianzhen (Great Economic Debates in China) (Beijing: Economic Management Publishing House, 2001), pp 220–221.
69 See the Interview with Mr Xiao Yang as the President of the SPC, Fashi Ribao (Legal Daily), 10 Mar 2002, p 4.
70 As stated by Fewsmith, “despite these and other preparations, there will invariably be cases of non-compliance”. Fewsmith (n 1 above), p 590.
the outcome of the government reform may not be over-optimistically expected simply because it will require the government to reform itself and will inevitably meet all kinds of resistance. Recently, two trends of such resistance are identified. First, some government authorities abolish quite a few approval procedures, but still keep the power to interpret their own regulations as a way to maintain their influence and control. By treating the current reform as a temporary campaign, some even hope that the old approval powers may be reinstalled in the future.

Second, many government departments carry out the deregulation measures by entrusting the old administrative powers to certain intermediaries under their control with the arrangement to share the profit. Some have warned that such a reform may just create a new level of government.

The concern raised by the European Union with the newly adopted regulation on foreign-funded telecom firms, which subject to foreign access to some restrictive conditions and burdensome procedures, in a sense also reflects the difficulty to change the traditional attitude to the further opening in the course of WTO accession on foreign investment. The recent division of the monopoly of China Telecom into a duopoly further brings disappointment since the restructuring bears little resemblance to the original reform plan approved by the central government.

Based on the discussion above, it seems clear that as long as the struggling between the rule by law with the instrumental approach and the rule of law as political and normative theory is not finally settled, the future development of the legal system in China will continue to face uncertainties or even a threat of the old political dictatorship.

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72 Wu Xuan, "Xionghe Shepu Gange Baping Quancha Yushengtui (Reform of Administrative Approval Should Not Create "Secondary Level of Government")", Zhongguo Qingnian Bao (China Youth Daily), 5 Apr 2002.


The second problem challenging China for its implementation of the WTO rules is the rampant local protectionism. Based on what China has done in the past years, more and more foreign experts and professionals believe in the seriousness of the central government’s commitment to the WTO provisions; however, at the same time, more and more seem to question the ability of the central government to effectively control the local governments in enforcing the WTO obligations as completely as it has agreed. Some even consider the local protectionism and the ignorance of the local governments to the national government’s edicts whenever possible perhaps the biggest threat to China’s compliance with the WTO rules.

Decentralisation, despite being an important part of the economic reform, has produced an unwanted consequence known as “new warlord-ism” where local governments fight for their local interests even by unlawful or corrupt means. Worse still, the long-term efforts to correct these local wrongdoings have not seen any significant improvement. On the eve of China’s accession to the WTO, the State Council repeatedly issued decisions to prohibit local protection and blockage. Even China’s accession has not changed the situation much. In a recent report, a number of judges from a special division of the People’s Court in charge of enforcement were sent from Guangdong Province to execute a judgment in Shanxi Province. They were kept under house-arrest for two days and another judge was even kidnapped and injured in late December 2001. Another telling example of such local protectionism is that a survey found that at the end of 2001, just within Guangdong Province, the toll booths approved by the provincial government alone had numbered 418, not including ones established by the lower level governments.

80 See the report of Ming Pao (Hong Kong), 23 Dec 2001, B7.
The number makes over one-seventh of the total booths in the entire nation, and in a district of Shenzhen the number of toll booths are even more than the combined number of a dozen of western European countries.\(^1\)

Local legislation is considered an important part of decentralisation and legal development in China. Since the end of 1970s, over 9000 local provisions and decrees have been adopted.\(^2\) A number of them, however, are contradictory to the national laws and are enacted for the purpose of protecting local interest. For example, at one time provisions were promulgated by a few local governments to promote the purchase of locally manufactured cars and block market access to products of other provinces using discriminating fees and different licence procedures.\(^3\) Moreover, the local protectionism has also seriously affected the judicial function. A recent investigation among 13 major cities in China showed that 84.1 per cent of interviewees reported various interventions by the local Communist Party branches or governments to judicial proceedings.\(^4\) As such, the President of the SPC, Xiao Yang, has warned that the localising of judicial functions would seriously damage the unity and authority of the national legal system.\(^5\)

In this regard, foreign commentators and the central government of China have reached an agreement on the consequences of the problem. According to the State Council, upon China’s accession to the WTO, elimination of local protectionism and the establishment of normal market order now matter not only for the historical opportunity of the nation on the path to globalisation, but also for the safety of the country and success of China’s modernisation.\(^6\) However, opinions are still

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\(^2\) See the report in Fazhi Ribao (Legal Daily), 30 Mar 2002, p 4.


\(^5\) See the report of Ming Pao (Hong Kong), 16 Aug 1999, A16.

\(^6\) See (13) of the State Council Decision of 27 Apr 2001 (n 78 above).
divided on how to effectively solve the problem. In China, the debate between new authoritarianism and advocacy for further decentralisation and redefining the central-local relations continues. More importantly, the solution of the problem seems to tie in with the issue of the rule of law as discussed above. To a large extent, local protectionism reflects the clash between market demands for fair and equal competition and the monopolised power of the Party and the government over local affairs. As such, the most efficient means of reducing local protectionism would be to change the traditional "administrative economy" to a governance model under the rule of law and market disciplines. The accession to the WTO will inevitably require further retreat of the State and the Party from playing an active role in the market and subject them to the rule of law. Beyond the implementation of the WTO commitments, the central-local tensions have also taken China to a crossroads where a new constitutional model of governance needs to be developed in order to accommodate political pluralism and a new power structure which will, in turn, have profound implications for China's compliance with the WTO rules.

The third factor that will affect China's implementation of its WTO obligations is the current economic conditions inside China. First of all, the huge unemployment pressure may pose a very serious threat to the smooth implementation of China's WTO obligations. Currently, according to the official statistics, the number of urban unemployed has reached

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59 For a recent discussion, see Donald J. Lewis, "Governance in China: The Present and Future Tense", in Brah'm (n 41 above), pp 235-243.

60 Chen Xiaojing, Fu Ning and Huang Fugao, Zhongguo Dijiang Zhengfu Tihi Jiegan (Institutional Structure of the Local Government in China) (Beijing: The Broadcasting and TV Publishing House of China, 2001), p 220; also see Fenorman (n 77 above).
14.6 million, or 7 per cent of the total number of urban workers. It is arguable, however, that 9 per cent is the maximum unemployment level in order to avoid a catastrophic economic crisis. There may be more problems in the future if this figure rises. A recent government study shows that in the near future, four million more workers will be laid-off, and over 12 million new urban workers will enter the market each year. The number of new jobs created each year will not exceed seven million – even if China is able to maintain its current high development rate. Moreover, in addition to the current rural labour surplus of over 100 million, the rural labour supply will continue to increase at an annual rate of 12 million. WTO membership may bring new job opportunities into China. Furthermore, the government has tried very hard to deal with the unemployment problem by implementing special policies and re-employment projects. However, the limited resources available and the underdeveloped social insurance system undoubtedly make this a daunting task with potentially significant impact on China’s performance of its WTO duties. Both domestic and foreign experts have warned of the exacerbation of such a problem and the potential crisis that could result.\(^1\)

Another equally challenging area is agriculture. Today, the rural population makes up 65 per cent of China’s total population of 1.3 billion. Millions of job opportunities must be created in the course of agricultural modernisation to accommodate the labour surplus in the countryside where low productivity and inefficiency mean it is very difficult to make sufficient profit from the land. Moreover, in one-third of the provinces of China, the remaining land is not enough to support farmers. Worse still, rural workers’ rights, particularly the right of land use and right to social protection, have not been well defined and recognised by the law.\(^2\) Against this background, implementation of China’s WTO commitments will

\(^1\) See the report of the study completed by the Ministry of Labour and Social Protection in early 2002, Zhongguo Jingji Shihao (China Economic Time), 7 Feb 2002, p 5; and Fewsmith (n 1 above), pp 576–580.

\(^2\) For a recent discussion, see Li Hongping, “WTO Yingxiu Xiangxiu Shanshui Wenti: Wujue yan Chubu (Three Agricultural Problems in the WTO Environment: Misunderstandings and Solutions)”, Nanjiang Zhunamou (Southern Weekend), 7 Feb 2002, p 2.
further pressure China to deal with rural issues.\textsuperscript{91} According to a senior
government official, China's agricultural import quota commitment may
mean the importation of 40 million tons of grain in 2002, or 9 per cent of
China's production. Under this arrangement, 25 million rural workers' 
income may be negatively affected. But perhaps an even larger problem in 
this regard is that few rural workers really understand the impact of the
WTO on their life and future. As a result, most of them will not be ready 
or capable of participating in international competition in the near future, 
but will continue to rely on the government for help.\textsuperscript{92}

Last, but not least, the major change in the CCP leadership in its
16th Congress in the second half of 2002 and instalment of a new gov-
ernment in 2003 also raise concerns regarding China's implementation 
of its WTO commitments.\textsuperscript{93} Although it is generally expected that the
trend of reform will continue under the new leadership, any new strat-
egy or policy orientation adopted by the new leadership may inevitably 
impact the pace and way of China's enforcement. Moreover, in a social-
ist country like China, the long-standing practice of "putting political
concerns above all" has not been abandoned completely. As a result, 
WTO accession may not change practices either and political uncer-
tainties will continue to exist in the entire course of transformation.\textsuperscript{94}

Conclusion

WTO accession has certainly enhanced and accelerated reform in China 
across the board. The serious preparation of the Chinese Government 
indicates and reflects, at least partially, the profound impact on the

\textsuperscript{91} For example, China has promised to return to a de minimis exemption for product-specific 
support equivalent to 8.5% of the total value of production of a basic agricultural product in
the Working Party on the Accession of China, in the Compilation of the Legal Instruments on 
China's Accession to the World Trade Organization, (Beijing: Legal Publishing House, 2002), 
pp 756-847.

\textsuperscript{92} See the interview with Mr Chen Xiwen as the Deputy Director of Development Research 
Centre of the State Council, \textit{Zhongguo Jingji Shibao} (China Economic Times), 7 Feb 2002, 
pp 1–2; and Hua Zhongwei, "Suika Gaosu Nongmin WTO" ("Who Tells Farmers about WTO?"), 

\textsuperscript{93} Fewsmith (n 1 above), pp 590–591.

\textsuperscript{94} For a recent discussion, see Qingjiang Kong, "Enforcement of WTO agreements in China", 
country – not just the foreign trade regime, but, more importantly, the political ideology and the model of governance. Based on what has been done so far, as shown above, it seems clear that China's firm commitment to modernising its economy and legal system is irreversible. However, given the current conditions, implementation still faces significant challenges such as the underdeveloped market, the tension between the instrumental approach of the CCP and the government and the rule of law, and the unsettled issues of the central-local relations. As a result, despite sincere efforts, the transformation of China to a WTO compatible market economy governed by the rule of law will be a long and bumpy course.