

**FIVE YEARS OF CHINA'S WTO
MEMBERSHIP.
EU AND US PERSPECTIVES ON
CHINA'S COMPLIANCE WITH
TRANSPARENCY COMMITMENTS AND
THE TRANSITIONAL REVIEW
MECHANISM**

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Legal Issues of Economic Integration, Kluwer Law International, Volume 33, n° 3,
2006, pp. 263-305

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ABSTRACT

China's accession to the WTO represents a goal achieved after nearly fifteen years of exhausting negotiations. However, many legal, political and social problems have not yet been tackled in terms of achieving real implementation of WTO provisions throughout the territory of the People's Republic of China. The Protocol requires a general and deep application of transparency, which will radically influence and change the Chinese legal system. There are a wide range of transparency related problems such as the formal publication of laws and regulations, procedural fairness in decision-making, the judicial review and the non-discrimination principle. The special "precautionary" instrument, the Transitional Review Mechanism (TRM), was included in the Protocol of China's Accession to the WTO, as requested by the US and supported by the EU. The TRM has the objective of monitoring and enforcement of implementation of WTO commitments, promoting transparency and the exchange of information in trade relations with China. Bilateral engagements and the multilateral forums are both essential to bring China into full compliance with its WTO commitments.

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GENERAL INTRODUCTION

China's accession into the World Trade Organization (WTO)¹ represents a desirable outcome for the worldwide market. It is a milestone² not only for China (*zhongguo*), but for the entire global economy, and it is a goal achieved after nearly fifteen years of exhausting negotiations carrying many legal, political and social implications for all parties.³ China was finally able to convince WTO members that without China, the WTO is only partially a worldwide trade organization.⁴ The road to the signature of the final agreement of accession was long,⁵ but these difficulties pale in comparison to the problems that have not yet been tackled in terms of achieving real

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Research for this article was conducted with the assistance of funding from Fondazione Banca del Monte di Lombardia; their support is gratefully acknowledged. I am deeply indebted to Prof. Giorgio Sacerdoti for his guidance and for inviting me to present an earlier draft of this essay at the Conference 'China in the World Trade System after its Accession to the WTO', 12 March 2004, Bocconi University, Milan. Particular gratitude goes to Ms. Maria Pereyra-Friedrichsen and to everybody at the Legal Affairs Division of the WTO who have welcomed me as a stagiaire in the spring 2004. I'm also thankful for the many helpful comments and suggestions I received by Prof. Nerina Boschiero, Prof. Claudio Dordi, Prof. Gabrielle Marceau, Dr. Giacomo Gattinara, Mr. Liao Shipang and Ms. Mariam Ahmedani. Mistakes are solely of my responsibility. For any comment: paolo.farah@unimi.it

¹ For an analysis of the transition from GATT to WTO, Robert HUDEC, *The GATT Legal System and World Trade Diplomacy*, Butterworth Legal Publishers, Salem, NH 1993; Giorgio SACERDOTI, 'La trasformazione del GATT nell'Organizzazione mondiale del commercio', (1995) *Diritto del commercio internazionale* at 73; Robert HUDEC, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System*, 1993, Butterworth Legal Publishers, Salem NH 1993; Gabrielle MARCEAU, 'Transition from GATT to the WTO: A Most Pragmatic Operation', (1995) 29 *Journal of World Trade* at 147; John H. JACKSON, *World Trade and the Law of GATT*, Bobbs-Merrill, Indianapolis 1969; David LUFF, *Le droit de l'Organisation mondiale du commerce. Analyse critique*, Bruylant, Bruxelles 2004, pp. 771-775. See also Paolo PICONE and Aldo LIGUSTRO, *Diritto dell'Organizzazione Mondiale del Commercio*, CEDAM, Padova, 2004; Giorgio SACERDOTI, 'Profili istituzionali dell'OMC e principi base degli accordi di settore', in Società Italiana di Diritto Internazionale, *Diritto e organizzazione del commercio internazionale dopo la creazione della Organizzazione mondiale del Commercio*, Editoriale Scientifica, Napoli 1998, pp. 1-20; Marcella DISTEFANO, *Soluzione delle controversie nell'OMC e diritto internazionale*, CEDAM, Padova 2001; Giovanna ADINOLFI, *L'Organizzazione mondiale del commercio. Profili istituzionali e normativi*, CEDAM, Padova 2001; Paolo PICONE and Giorgio SACERDOTI, *Diritto internazionale dell'economia*, F. Angeli, Milano 1991; Gabriella VENTURINI, *L'accordo generale sulle tariffe doganali ed il commercio*, Giuffrè, Milano 2004; Piet EECKHOUT, *External Relations of the European Union, Legal and Constitutional Foundations*, Oxford University Press, Oxford 2004

² Robert HERZSTEIN, 'Is China Ready for the WTO Rigors?', (1999) Publication of the Center for Security Policy, No. 99 F-33. Available: <http://www.security-policy.org/papers/1999/99-F33.html>

³ See generally, Karen HALVERSON, 'China's WTO Accession: Economic, Legal, and Political Implications', (Spring 2004) 27 *Boston College International and Comparative Law Review*; Alan ALEXANDROFF, 'Concluding China's Accession to the WTO: the U.S. Congress and Permanent Most Favored Nation Status for China', (1998-1999) 3 *UCLA Journal of International Law & Foreign Affairs* at 25

⁴ 'WTO Ministerial Conference Approves China's Accession', World Trade Organization, Press Release, 10 November 2001. Available: http://www.wto.org/english/news_e/pres01_e/pr252_e.htm (last visited: 20-05-04). James FEINERMAN, 'China's Quest to Enter the GATT/WTO', (1996) 90 *American Society of International Law Procedure* at 402: 'PRC diplomats have been lobbying the GATT intensively since the early 1980s to gain admission'. See also Maria WEBER, *Il miracolo cinese: perché bisogna prendere la Cina sul serio*, Il Mulino, Bologna 2003, pp. 83-84; Leila CHOUKROUNE, 'Chine et OMC: l'état de droit par l'ouverture au commerce international?', (2002) 6 *Revue de droit des affaires internationales* at 655

⁵ Raj BHALA, 'Enter the Dragon: An Essay on China's WTO Accession Saga', (1999-2000) 15 *American University International Law Review* at 1471

implementation of its provisions throughout the territory of the People's Republic of China (PRC).⁶ China's accession surely presents the world trading system with opportunities, but also poses the challenge of integrating a market with strong structural, behavioural and cultural constraints.⁷

Prior to China's accession and in the subsequent debates on the implementation of China's WTO commitments, some have focused on the market access concessions, tariff reductions or on the liberalization requirements for the integration of China in the world trading system. A second group of scholars, researchers and analysts have placed more emphasis on transparency issues, such as legal and administrative policies that China must establish to ensure equitable and efficient resolution of commercial and trade disputes.⁸

While recognising the key importance of all these issues, this piece will focus on the latter group, because these commitments will radically influence and change the Chinese legal system. Particular attention is given to the last four years of the review and evaluation of the Chinese legal reforms through the Transitional Review Mechanism (TRM),⁹ in view of complying with the WTO transparency commitments. China has to become increasingly aware of the new system to which it has become a member. This system implies state international liability in the event of non-compliance with its obligations, such as respecting transparency requirements and WTO legal and administrative policies.

In the opinion of the present author, the most relevant obstacle to an effective implementation of the WTO and bilateral agreements is the problem of 'internal barriers'¹⁰ that have distinctive features because of China's unique historical background, including the communist period, long-standing imperial traditions¹¹ and feudalism. The lack of stable rules to define relations between the central

⁶ Donald C. CLARKE, 'China's Legal System and the WTO: Prospects for Compliance', (Winter 2003) 2 *Washington University Global Studies Law Review* at 97 (hereinafter CLARKE)

⁷ Several members of the Committee decided to write analytical papers about China's accession. See John H. JACKSON, 'The Institutional Ramifications of China's Accession to the WTO', in Frederick M. ABBOTT, *China in the World Trading System: Defining the Principles of Engagement*, Kluwer Law International, The Hague 1998. For an overview of other challenges for the WTO after ten years from its foundation, see generally Gabriella VENTURINI, Giuseppe COSCIA and Michele VELLANO, *Le nuove sfide per l'OMC a dieci anni dalla sua istituzione*, Giuffrè Editore, Milano 2005; see also Rufus YERXA and Bruce WILSON (eds.), *Key Issues in the WTO Dispute Settlement. The First Ten Years*, Cambridge University Press, Cambridge 2005

⁸ United States Government Accountability Office (GAO), *Report to Congressional Committees: US-China Trade, Opportunities to Improve U.S. Government Efforts to Ensure China's Compliance with World Trade Organization Commitments*, GAO-05-53, 6 October 2004, Washington DC 2004, p. 6.

Available: <http://www.gao.gov/new.items/d0553.pdf>; Karen HALVERSON, 'China's WTO Accession: Economic, Legal, and Political Implications', *cit.* at 346; Jianguy WANG, 'The Rule of Law in China: A Realistic View of the Jurisprudence, the Impact of the WTO, and the Prospects for Future Development', (2004) *Singapore Journal of Legal Studies* at 374-389; Alan S. ALEXANDROFF, 'The WTO's China Problem', (May 2000) 21 *Policy Options* 4 at 64. Available also: <http://www.irpp.org/po/archive/may00/alexandr.pdf>

⁹ The Transitional Review Mechanism is a special multilateral mechanism for reviewing Chinese legal system, and it was included in the Protocol of China's accession to the WTO

¹⁰ See generally Pitman B. POTTER, *The Chinese Legal System: Globalization and Local Legal Culture*, Routledge, London 2001

¹¹ Qingjiang KONG, 'China's WTO Accession: Commitments and Implications', (2000) *Journal of International Economic Law* at 658

authority and the increasingly powerful local entities undermines the good intentions of the Chinese central government.¹² China will not be able to resolve its internal limits and really fight against the local trade barriers without foreign co-operation and involvement. The final Protocol reflects the terms and conditions of the various Chinese bilateral agreements¹³ with the United States (US),¹⁴ the European Union (EU)¹⁵ and Canada.¹⁶ The EU and the US¹⁷ are taking on key roles in the implementation of the WTO agreement for China's accession, and their monitoring action will be essential to improve the PRC's internal juridical system. The increasing collaboration between China and the EU, and between China and the US, could be a potential solution for China's internal problems and a great opportunity for the EU¹⁸ and the US. The development of bilateral trade relations, the creation of programs with a view to exchange of expertise and know-how,¹⁹ and the dispatch of foreign officials to China and of Chinese officials to the EU-US would facilitate the

¹² See generally Pitman B. POTTER, 'China and the WTO: Tensions Between Globalized Liberalism and Local Culture', (1999) 32, 3 *Canadian Business Law Journal*

¹³ Fabio SPADI, 'L'evoluzione del protocollo di accessione della Repubblica Popolare Cinese all'Organizzazione mondiale del commercio', (2000) *Diritto del commercio internazionale* at 205-207

¹⁴ Chinese-US negotiations finally came to an end in November 1999 with a bilateral agreement for China's accession. In 2000, China was recognized by the US Congress with a permanent normal trade status. See http://www.ncfb.com/daily2001/June_11_17_2001/u.htm. For an overview of the US-China policy for the accession of China to the WTO, see generally Alan ALEXANDROFF, 'Concluding China's Accession to the WTO: the US Congress and Permanent Most Favored Nation Status for China', *cit.*; as regards the US relations with China during the Clinton and Bush administrations, see Maria WEBER, *Il dragone e l'aquila. Cina e USA. La vera sfida*, EGEA, Milano 2005, pp. 59-84

¹⁵ The bilateral EU-China agreement on WTO was signed in Beijing on 19 May 2000. For an overview of the results achieved by the EU in addition to the Sino-US accord, see the 'Sino-EU Agreement on China's Accession to the WTO: Results of the Bilateral Negotiations'.

Available: http://europa.eu.int/comm/trade/issues/bilateral/countries/china/index_en.htm

For further analysis, see Nicolas LIGNEUL, 'La portée de l'accord bilatéral conclu entre l'Union Européenne et la Chine. Le 19 Mai 2000: entre bilatéralisme et multilatéralisme', (Juillet-Août 2000) *Revue de Marché Commun et de l'Union Européenne* at 436-440; Eberhard SANDSCHNEIDER, 'China's Diplomatic Relations with the States of Europe', (March 2002) *The China Quarterly* at 33-44; Franco ALGIERI, *cit.* at 64; Markus TAUBE, 'Economic Relations between the PRC and the States of Europe', (March 2002) *The China Quarterly* at 79-105; Olivier PROST and Song Li WEI, 'China's Accession to the WTO: How will this Benefit European Undertakings?', (2000-2001) 24 *Fordham International Law Journal* at 554-559

¹⁶ China and Canada signed in Toronto in November 1999 their bilateral agreement on China's accession into WTO as another step forward to the admission of China to the WTO. Canada was the 14th country to complete the WTO bilateral talks with China. See <http://www1.chinadaily.com.cn/highlights/docs/2001-04-30/2963.html>

¹⁷ Congressional-Executive Commission on China, *2002 Annual Report*, One Hundred Seventh Congress, Second Session, 2nd October 2002, US Government Printing Office, Washington DC 2002, p. 49: 'The US-China Relations Act of 2000 requires the USTR to submit an annual report on China's compliance with its WTO commitments, including the findings of the Department of Commerce's compliance monitoring program. [...] the Senate Finance and House Ways and Means Committees have tasked the General Accounting Office (GAO) with a four years project to examine China-WTO implementation issues.' Available: <http://www.cecc.gov/pages/annualRpt/2002annRptEng.pdf>

¹⁸ See José Manuel BARROSO, 'The EU and China: Painting a Brighter Future Together', SPEECH/05/444, Chinese Academy of Social Sciences, Beijing, 15 July 2005. Available:

<http://europa.eu.int/rapid/pressReleasesAction.do?reference=SPEECH/05/444&format=HTML&aged=0&language=en&guiLanguage=en>; see also Olivier PROST and Song Li WEI, *cit.* at 554

¹⁹ Report from the Commission to the Council and the European Parliament on the Implementation of the Communication, *Building a Comprehensive Partnership with China*, COM (2000) 552 final, Brussels, 8 September 2000 at 2. Available : http://europa.eu.int/comm/external_relations/china/com_98/index.htm

fostering of reciprocal knowledge.²⁰ Bilateral engagements and the multilateral forums are both essential to bring China into full compliance with its WTO commitments.

²⁰ Commission Policy Paper for transmission to the Council and the European Parliament, *A Maturing Partnership - Shared Interests and Challenges in EU-China Relations*, COM (2003) 533 final, Brussels, 10 September 2003 at 14. Available: http://europa.eu.int/comm/external_relations/china/com_03_533/com_533_en.pdf
See also Report from the Commission to the Council and the European Parliament on the Implementation of the Communication, *Building a Comprehensive Partnership with China*, cit. at 10