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CHINA'S LEGAL SYSTEM AND THE WTO: PROSPECTS FOR COMPLIANCE

DONALD C. CLARKE*

INTRODUCTION

It is well understood both inside and outside of China that the task of making China's laws and regulations conform to World Trade Organization (WTO) requirements is a huge one. But a key feature of China's accession to the WTO that sets it apart from most other countries is not the size of the task, but the fact that accession is part of a larger strategy of massive and fundamental economic reform.

China's economic reform era is now over twenty years old. The scope of the planned economy has been steadily shrinking, and few state-owned enterprises can afford to ignore market principles. Tariffs and non-tariff trade barriers had been steadily dropping prior to WTO entry, while rules on foreign investment were gradually liberalized. The Chinese government has embarked on this strategy for its own sake, not to fulfill treaty commitments to foreigners, and Chinese leaders have sought WTO membership not simply because they believe that it will open more markets to Chinese products, but because they see membership as giving them extra leverage to force through difficult changes in the domestic economic system. Many in the leadership understand that China's WTO commitments, while labeled "concessions" in the language of international trade negotiations, are not really "concessions" to be reluctantly yielded at all, but rather sound policies that China would be wise to adopt even without WTO membership.¹ Reforms simply imposed from outside are

* Professor of Law, University of Washington, Seattle, Washington. I wish to thank the Asian Law Forum of Yale Law School for providing the initial stimulus to put together some thoughts on the subject of this article, and the China Law Center at Yale Law School for providing the environment in which to do it. These themes were further developed in testimony before the U.S.-China Security Review Commission in January, 2002 and the Congressional-Executive Commission on China in June, 2002, as well as at a panel at the March, 2002 annual meeting of the American Society of International Law.

I am privileged to be able to publish this final version in a collection honoring Bill Jones, one of the founders of Chinese law studies in this country, and an exemplar—with his erudition, wit, and uncommonly gracious manner—of the kind of scholar we should all aspire to be. I am proud to count myself a friend and colleague.

1. See, for example, the remarks of Kong Xiangjun, a judge in the administrative tribunal of the Supreme People's Court:

[W]e should not . . . conclude that [China's commitments regarding judicial review] are some

unlikely to go beyond surface compliance—if they get even that far—and truly take root. But many of the reforms required by China's WTO accession, from market opening to greater transparency in administrative procedures, have a strong domestic constituency as well as a foreign one. In November of 2001, for example, the influential *Fazhi Ribao* [*Legal System Daily*], published no fewer than three commentaries by prominent law professors welcoming the pressures that WTO membership would impose in the direction of limited government and increased transparency.² Thus, although China's trading partners may encounter rules and practices inconsistent with China's WTO commitments and delays in curing these inconsistencies, it is not necessarily due to bad faith and foot-dragging by the central government (although of course that is a possibility). In many cases it will be due simply to the normal and well-documented difficulty the central government faces in getting many things done.

This is by no means a counsel of inaction and infinite patience on the part of China's trading partners in the face of a failure by China to live up to its commitments in certain areas. As I have noted, part of the whole point of China's joining the WTO—a central government decision essentially imposed on local governments—was to add foreign pressure to existing domestic pressures for reform. It does nobody any favors to pretend that specific and binding obligations do not exist. But it is necessary to bear in mind that not all violations will be deliberate, and that not all delay is obstruction.

kind of price or sacrifice that had to be made for China to enter the WTO. This kind of provision reflects the serious attitude and commitment of China to promoting the advancement of the rule of law It is completely in accord with China's strategy of governing the country according to law and will advance China's progress in establishing the rule of law. The beneficiary in the end will be China.

Kong Xiangjun, *Jianli yu WTO Yaoqiu Xiang Shiyong de Sifa Shencha Zhidu* [*Establish a System of Judicial Review that Meets the Requirements of the WTO*], *ZHONGGUO FAXUE* [CHINESE JURISPRUDENCE], no. 6, at 3, 8 (2001).

2. See Yuan Chengben, *Ru Shi Wei Sifa Gaige Tian Dongli* [*Joining the WTO Pushes Forward Judicial Reform*], *FAZHI RIBAO* [LEGAL SYSTEM DAILY], Internet edition, Nov. 30, 2001 (interviewing Professor Li Shuguang); Ma Huaide, *WTO Yu Zhengfu Zhizheng Linian* [*The WTO and the Guiding Concept of Government*], *FAZHI RIBAO* [LEGAL SYSTEM DAILY], Nov. 26, 2001, at 5; Wang Feng, "*Ru Shi*" Yaoqiu Zhengfu Juese Zhuanhuan [*Entry into the WTO Requires a Change in the Role of Government*], *FAZHI RIBAO* [LEGAL SYSTEM DAILY], Nov. 12, 2001, at 1; see also Nan Xianghong, *WTO: Fa de Chongxin Goujia* [*WTO: The Restructuring of Law*], *NANFANG ZHOUMO* [SOUTHERN WEEKEND], Internet edition, Oct. 25, 2001; Guo Guosong, *Wei Sifa Gongzheng Jianli Zhidu Bingzhang* [*Establish Institutional Protections For Judicial Justice*], *NANFANG ZHOUMO* [SOUTHERN WEEKEND], Internet edition, Oct. 25, 2001 (addressing the need for better court procedures, from improving the quality of judges to achieving greater transparency). For Chinese language sources, I have placed the author's surname before the given name in accordance with Chinese usage.

DOMESTIC APPLICABILITY WITHIN CHINA OF WTO NORMS

One issue that has been the subject of some debate both inside and outside of China is that of the effect within the Chinese legal system of China's WTO obligations. In my view, as a practical matter, China's WTO obligations will not become part of its domestic law, binding on courts and government bodies, until the enactment of appropriate domestic legislation and regulations incorporating those obligations. To hold otherwise would be to believe that Chinese courts would act contrary to existing domestic regulations on the basis of nothing more than a treaty text. Although as a *legal* matter the issue is less clear, I believe that on balance the better legal conclusion conforms to the practical one.

China became a WTO member through its internal procedures for the signing and ratification of treaties.³ There are three ways in which China's treaty obligations might become part of its domestic law. First, they can be embodied in domestic legislation—a term I use here to include all authoritative sources of state norms in China, including “interpretations” and other documents issued by the Supreme People's Court and other bodies. China has adopted this approach, known as “transformation,” on many occasions.⁴ Second, they can be incorporated through specific reference in domestic legislation. This approach, which I shall call “mediated incorporation,” can be found in Article 142 of the General Principles of Civil Law and Article 238 of the Law on Civil Procedure. Each law directs courts, in cases involving foreigners, to apply the provisions of international treaties to which China is a signatory when such provisions conflict with relevant provisions of the law in question. This approach can also be found in directives issued to lower courts by the Supreme People's Court. In 1987, for example, the court issued a notice to

3. Professor Bing Ling of the City University of Hong Kong makes a persuasive argument that the ratification procedure was defective in that the National People's Congress Standing Committee granted a before-the-fact authorization (on August 25, 2000, long before the accession protocol had taken its final form and been signed by the Chinese government's representative), not an after-the-fact ratification. See Bing Ling, *Is China's Accession to the WTO Legally Valid?* (2002), at <http://personal.cityu.edu.hk/lwbing/Research/WTO.pdf> (last visited Oct. 29, 2002). As Professor Ling points out, however, the validity of China's accession, in spite of any procedural defects, seems unquestionable as a matter of international law under Articles 45 and 46 of the Vienna Convention on the Law of Treaties. See *id.*; see also James Kyngé, *Academics Hit at Procedure to Join WTO*, FIN. TIMES, Nov. 20, 2001, at 14. I would argue further that as a practical matter it is unquestionable—or at least, will not be questioned—as a matter of Chinese domestic law as well.

4. In 1986, for example, the Standing Committee of the National People's Congress adopted the Regulations of the People's Republic of China on Diplomatic Privileges and Immunities, thereby transforming into domestic law China's obligations under the Vienna Convention on Diplomatic Relations.

lower courts instructing them to give priority to the provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards in cases where the Convention applied and domestic law contained contrary provisions.⁵ While the mediated incorporation approach requires Chinese courts and government bodies ultimately to look directly to treaty texts instead of the texts of domestic law, it is domestic law that tells them to do so.

While the above two methods of making treaty obligations part of domestic law are not controversial, real debate revolves around the issue of whether bare treaty obligations, *without more*, can or should be considered a source of binding norms by legal decisionmakers. While academic views on this question are divided, the views of government officials are generally in the negative: specific transformation or mediated incorporation is necessary. This was certainly the view China presented in the meetings of the WTO Working Party, where China undertook to meet its WTO commitments “through revising its existing laws and enacting new ones fully in compliance with the WTO Agreement.”⁶

Whether treaty obligations can become part of domestic law without further mediation (a theory I shall call “unmediated incorporation”) is a subject for debate because both the Chinese constitution and China’s legislation are silent on the issue. Indeed, China’s first post-1949 textbook on international law, the chief editor of which was the eminent scholar Wang Tieya, ably canvasses various approaches, but takes no position on which one applies in China.⁷

The official view has long been that China had a system in which its international law obligations automatically became part of domestic law. This view was formed, however, in an era when China’s international law obligations were all state obligations, and private rights were not implicated. Thus, China had essentially no international law obligations

5. See Zuigao Renmin Fayuan Guanyu Zhixing Woguo Jiari de “Chengren Ji Zhixing Waiguo Zhongcai Caijue Gongyue” de Tongzhi [Notice of the Supreme People’s Court on the Implementation of the “Convention on the Recognition and Enforcement of Foreign Arbitral Awards” of Which China Is a Member], art. 1 (Apr. 10, 1987).

6. World Trade Organization Ministerial Conference, *Report of the Working Party on the Accession of China*, WT/MIN(01)/3, Nov. 10, 2001, available at http://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm [hereinafter Working Party Report], ¶ 67.

7. See GUOJI FA [INTERNATIONAL LAW] 42-47, 346-48 (Wang Tieya ed., 1981); see also GUOJI FA [INTERNATIONAL LAW] 37-42 (Liu Haishan ed., 1992); GUOJI GONGFA [INTERNATIONAL PUBLIC LAW] 37-41 (Liang Shuying ed., 1993). Liang Shuying’s work seems to hold that domestic law takes priority over international obligations in case of conflict, as it expresses the need for governments to strive to ensure that their domestic legislation is consistent with such obligations. See GUOJI GONGFA, *supra*, at 39. If international obligations took priority, consistency would not matter.

about which court enforcement in private litigation might be an issue. Its obligations were obligations of the government to do or not to do things with respect to other governments and their officials. Hence, it was possible to hold that there was and could be no conflict between international law and China's domestic law, because the government would always do what international law required of it.

Once one begins talking about the recognition of private rights, however, the argument becomes more difficult to support. Wang Tieya and others support their argument by noting the existence of some statutes providing that where the provisions of the statute conflict with China's international treaty obligations, China's international treaty obligations shall override the provisions of the statute.⁸ But surely this shows precisely that a specific rule in a domestic statute is necessary to give domestic legal effect to a treaty obligation. The very fact that the rule needs to be stated in a domestic statute or other official norm contradicts their position.

The key proof of the theory of unmediated incorporation would be a case where a court, in the absence of an authoritative instruction to refer to treaty provisions, nevertheless applied such provisions even though the rules of domestic law dictated a different result. I know of no such case. A recent article by Qingjiang Kong cites two cases⁹ that the author believes demonstrate the direct and unmediated application of treaty provisions by Chinese courts.¹⁰ In both cases, Chinese courts purported to apply the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading (Hague Rules). A reading of the cases reveals that they did so, however, because the parties had agreed contractually to apply the Hague Rules to their disputes. Indeed, China is not even a

8. See, e.g., sources cited *supra* note 7 and accompanying text. This argument is made in Tieya Wang, *The Status of Treaties in the Chinese Legal System*, 1 J. CHINESE & COMP. L. 1 (1995) and Meng Xianggang, *Woguo Shiyong WTO Guoji Guize de Liang Wenti [Two Issues in the Application in China of the International Rules of the WTO]*, RENMIN FAYUAN BAO [PEOPLE'S COURT NEWS], Internet edition, Mar. 29, 2001. It appears in many other sources as well. The strongest argument I have seen from a court or government official appears in Sun Nanshen, *Cong Zhongguo Ru Shi Kan WTO Xieyi Zai Zhongguo Fayuan de Shiyong [Viewing the Application of the WTO Agreements in Chinese Courts from China's Accession to the WTO]*, FALÜ SHIYONG [APPLICATION OF LAW], no. 9, at 2 (2000) (the author is a vice president of the Jiangsu Province Higher Level People's Court, only one level below the Supreme People's Court). In addition to the argument from incorporation favored by Wang Tieya, Sun argues (as do others) that the similarity in procedure for national legislation and treaty ratification means that they should have equal legal validity. See *id.*

9. China Material Supply Corp. of Xiamen Special Econ. Zone of Fujian Province v. Europe-Overseas Steamship Lines NV Belg., 3 CHINA LAW REPORTS 740 (P. Leung ed., 1995) (Maritime Court of Shanghai City, Dec. 9, 1991); Japan (Taisho) Sea Fire Ins. Co. v. Tianjin Branch of China Gen. Foreign Trade Trans. Co., *id.* at 745 (Maritime Court of Tianjin City, Nov. 22, 1991).

10. See Qingjiang Kong, *Enforcement of WTO Agreements in China: Illusion or Reality?*, 35 J. WORLD TRADE 1208 (2001).

signatory to the Hague Rules, and thus there was no treaty obligation in the first place.

Whatever academic views might be,¹¹ the views that count, from the standpoint of China's trading partners and those doing business in China, are those of government officials, and in particular court officials. As noted above, I believe the statement of China's representative to the WTO Working Party constitutes a denial of the doctrine of unmediated incorporation. Equally important, however, are statements from senior officials of the Supreme People's Court (which has authority over the court system) and academics published in official or semi-official sources. Professor Jiang Guoqing, for example, states in a lecture posted on a website administered by the Office of the National People's Congress Standing Committee that treaty norms do not apply in domestic law unless there is a specific domestic law norm making them apply.¹² Kong Xiangjun of the Administrative Chamber of the Supreme People's Court¹³ and Cao Shouye, also a judge in the Supreme People's Court,¹⁴ voice similar views. Finally, the President of the Supreme People's Court recently declared:

In the course of adjudication, People's Courts must be knowledgeable about both domestic law and WTO rules; they must both grasp the technique of application of international treaty through transformation into domestic law, and do a good job in making judicial interpretations in accordance with the provisions of domestic law; they must both ensure the correct implementation of

11. A good statement in English of the position against unmediated incorporation is Zhaojie Li, *The Effect of Treaties in the Municipal Law of the People's Republic of China: Practice and Problems*, 4 ASIAN Y.B. INT'L L. 185 (1994).

12. Jiang Guoqing, *Guoji Fa yu Guoji Tiaoyue de Jige Wenti [Some Issues of International Law and International Treaties]*, QUANGUO RENDA CHANGWEIHUI FAZHI JIANGZUO JIANGGAO ZHI SHISI [NATIONAL PEOPLE'S CONGRESS STANDING COMMITTEE LECTURES ON THE LEGAL SYSTEM, NO. 14] July 4, 2001, at <http://www.npcnews.com.cn> (website administered by the Office of the National People's Congress Standing Committee, News Bureau, Information Center).

13. See Kong Xiangjun, *Tongyi Jieshi Yuanze yu WTO Falü de Sifa Shiyong [The Doctrine of Consistent Interpretation and the Use in Adjudication of WTO Law]*, FAZHI RIBAO [LEGAL SYSTEM DAILY], Oct. 14, 2001, at 3; Kong Xiangjun, *WTO Falü de Guonei Shiyong [The Domestic Application of WTO Law]*, FAZHI RIBAO [LEGAL SYSTEM DAILY], Dec. 16, 2001, at 1; Kong Xiangjun, *supra* note 1, at 3.

14. See Cao Shouye & Wang Fei, *Zhongguo Fayuan Shiyong WTO Guize [The Application of WTO Rules by Chinese Courts]*, RENMIN FAYUAN BAO [PEOPLE'S COURT DAILY], Oct. 15, 2001, at <http://www.rmfb.com/public/detail.php?id=29271>; Cao Shouye, *Zhongguo Ru Shi Dui Renmin Fayuan de Yingxiang [The Effect Upon People's Courts of China's Entry Into the WTO]*, RENMIN FAYUAN BAO [PEOPLE'S COURT DAILY], Oct. 15, 2001, at <http://www.rmfb.com>.

international treaties in China, and pay attention to upholding state judicial sovereignty and the dignity of law.¹⁵

While this statement is not as resolutely unambiguous as one might wish, it seems, with its constant references to domestic law and state sovereignty, to put the Supreme People's Court in the camp of the anti-unmediated incorporation school. Certainly this is consistent with what we already know about the operation of Chinese courts. Chinese courts tend to follow a hierarchy of rules that is the opposite of the putative hierarchy set forth in the constitution. While National People's Congress legislation should take priority over conflicting State Council regulations, for example, in reality it is usually the other way around.¹⁶ It is hard, therefore, to imagine that Chinese courts, which would uphold a State Council rule against a contrary, but theoretically higher, National People's Congress statute, and a National People's Congress statute against a contrary, but theoretically higher, provision in the constitution, would override a very clear provision in an authoritative Chinese regulation in favor of a claim based solely on a right allegedly granted in one of the WTO agreements.

The practical import of this discussion is twofold. First, the fact that such an important issue—whether or not courts can or should directly apply the provisions of China's treaty obligations without further domestic legal authority—could go unresolved for so long shows the limited role traditionally played by courts and the legal system in the Chinese polity. This question has not been answered because it has never been a very important question. Second, assuming that the dominant official view is the one that will actually be adopted by courts and government institutions, this need not be a source of great alarm to foreign governments and traders. It is no different from the position taken by the United States with respect to its own WTO obligations.¹⁷ In any case, the

15. Xu Lai, *Xiao Yang Zai Renmin Fayuan "Ru Shi" Hou Shenpan Gongzuo Zuotanhui Shang Tichu Zhuanbian Sifa Guannian Tigong Sifa Baozhang* [*Xiao Yang Suggests Transforming Judicial Concepts and Providing Judicial Protections at Roundtable Discussion on People's Court Adjudication Work After Accession to the WTO*], FAZHI RIBAO [LEGAL SYSTEM DAILY], Nov. 21, 2001, at 1 (quoting Supreme People's Court President Xiao Yang).

16. See Donald C. Clarke, *State Council Notice Nullifies Statutory Rights of Creditors*, E. ASIAN EXECUTIVE REP., Apr. 15, 1997, at 9.

17. The 1994 Uruguay Round Agreements Act, the domestic legislation pursuant to which the United States entered the WTO, provides that in case of conflict, U.S. federal law prevails over a WTO agreement and that WTO agreements prevail over state law, but only in actions brought by the U.S. government. Uruguay Round Agreements Act § 102, 19 U.S.C. § 3512 (2002).

number of private lawsuits before Chinese courts potentially implicating private rights granted under the WTO agreements is likely to be small.¹⁸

CHINA'S ABILITY TO COMPLY WITH WTO COMMITMENTS AND PROCEDURES

In assessing China's ability to fulfill its commitments respecting its legal system and to comply with WTO procedures in such matters as the Transitional Review Mechanism and dispute resolution, we need both to look forward and to look back. Looking back, one cannot fail to be impressed with the amount of work that has been done by the government so far in identifying and revising—or abolishing where necessary—laws and regulations inconsistent with China's WTO obligations.¹⁹ This work began, of course, long before China's formal accession in November 2001. The scope of the effort can be appreciated by seeing what the Ministry of Foreign Trade and Economic Cooperation (MOFTEC) is reported to have achieved by the end of 2000 in anticipation of WTO membership: the review of over 1400 laws, regulations, and similar documents, including six statutes (of which five were revised), 164 State Council regulations (of which 114 were to be repealed and 25 amended), 887 of its own ministry regulations (of which 459 were to be repealed and 95 amended), 191 bilateral trade agreements, 72 bilateral investment treaties, and 93 tax treaties.²⁰ In the first two months of 2001, the various ministries and commissions of the State Council reportedly reviewed some 2300 laws and regulations, of which 830 were identified as in need of repeal and 325 as in need of revision.²¹

Needless to say, the process of trying to identify inconsistent regulations in the abstract is bound to miss many problem areas. Identifying inconsistency is sometimes easy, but at other times takes a

18. The main areas where rights under WTO agreements might be directly asserted are (1) administrative litigation against Chinese government departments for (for example) failure to grant permits on a most-favored-nation basis, to reduce tariffs, or to take other actions promised in China's accession protocol, and (2) proceedings to enforce intellectual property rights, in which the substantive and especially the procedural protections of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) could be attractive to plaintiffs.

19. This Article is not the place to canvass in detail what China has already accomplished in terms of WTO implementation. The United States-China Business Council has compiled useful summaries that can be found at U.S.-China Business Council, *Towards WTO: Highlights of PRC Implementation Efforts to Date* (June 2001), at <http://www.uschina.org/prcwtocompliance.pdf> and *Toward WTO: Highlights of PRC Implementation Efforts to Date, September 2001*, CHINA BUS. REV., Jan.-Feb. 2002, at 14.

20. See Nan Xianghong, *supra* note 2.

21. See *id.*

high level of expertise and a full hearing by a dispute settlement panel in the context of a particular set of facts. Thus, we should not be surprised if many inconsistencies remain despite the government's efforts. Nevertheless, the government has so far shown a great deal of energy in addressing problems of legislative inconsistency.

A great deal of activity has also occurred outside of the field of legislative revision. In a relatively short period of time both before and after China's accession to the WTO, the government promulgated a flood of new regulations designed to implement China's commitments. Chinese officials have participated in countless training sessions, many with foreign financial support.²² The government has begun restructuring to facilitate the satisfaction of WTO requirements. For example, MOFTEC has established a Department of WTO Affairs to handle implementation and litigation, and a China WTO Notification and Enquiry Center in order to help implement its transparency commitments.²³ MOFTEC has also established a Fair Trade Bureau for Import and Export to handle issues relating to unfair trade practices. The courts, for their part, have also undertaken training and other activities, such as review for WTO-compatibility of existing Supreme People's Court interpretations and other directives, designed to meet the requirements of WTO accession.²⁴

While much work remains to be done, there can be little doubt of the energy and commitment shown so far by the Chinese government. And this is to say nothing of the enthusiasm for knowledge about the WTO displayed outside of government. Almost any lecture or presentation mentioning the WTO is guaranteed to draw a large audience, and indeed among urban Chinese the English abbreviation is probably as common as, if not more common than, the original (and shorter) Chinese abbreviation (*shi mao*).

22. Brian L. Goldstein, Stephen J. Anderson, and Jeremie Waterman provide a partial, but nevertheless very long, list of such programs. See Brian L. Goldstein et al., *Foreign Contributions to China's WTO Capacity Building*, CHINA BUS. REV., Jan.-Feb. 2002, at 8, 10-11.

23. See Ministry of Foreign Trade and Economic Cooperation, *Guanyu Zhongguo Zhengfu WTO Zixun Dian Zixun Banfa (Zanxing)* [Measures Regarding the Making of Inquiries at the Government of China's WTO Inquiry Point (Temporary)] (issued Jan. 1, 2002, effective Jan. 14, 2002) (providing the inquiry point with the official English name of "China WTO Notification and Enquiry Center"). A report dated April 11, 2002 stated that as of that time the Center had received over 300 inquiries. See XINHUA WANG [NEW CHINA NET], *Jiangqiu Chengxin! Woguo Qieshi Lüxing Jiaru Shimao Zuzhi de Gexiang Chengnuo* [Stress Sincerity! China Conscientiously Implements Each Commitment Made Upon WTO Entry] (Apr. 11, 2002), at <http://www.exin.net/economic/itemview1.jsp?id=334638> (last visited June 3, 2002).

24. See *To WTO Accession, Chinese Courts Think Ahead*, CHINA L., Feb. 2002, at 58 (interviewing Supreme People's Court official Li Guoguang for a general account of activities within the court system) [hereinafter *Li Interview*].

Looking forward, there is reason to be generally sanguine about the prospect of China's compliance with its commitments and its willingness and ability to modify its rules if it loses a WTO dispute settlement proceeding. But there will be disappointments, and it is necessary to understand and anticipate them in order to put them in proper perspective and distinguish real and pressing problems from temporary and minor ones.

As noted earlier, China undertook in the Working Party Report to meet its WTO commitments "through revising its existing laws and enacting new ones fully in compliance with the WTO Agreement."²⁵ The extent to which China revises its existing laws and promulgates new ones is something that can be monitored with relative ease. But clearly it is not enough simply to promulgate new regulations. They must be applied and enforced. Here, there are at least two major issues worthy of discussion.

The first is the extent to which local governments will engage in WTO-inconsistent practices that the central government is unable or unwilling to stop. One issue is clear: there is no question that, as a legal matter under China's constitutional system, local governments must follow directives from the central government. Because the central government has the legal *capacity* to require local governments to conform to WTO obligations, it has the *obligation* to do so.

Some members of the WTO Working Party on China's accession were reported to have expressed concern that subnational governments in China might take measures inconsistent with China's WTO obligations, and that the central government would not or could not remove such measures. China's representative assured them that local governments had no autonomous authority over trade-related matters,²⁶ and that the central government would "ensure" (not merely take the "reasonable measures" called for by Article XXIV:12 of the General Agreement on Tariffs and Trade (GATT) 1994) that local government regulations conformed to China's WTO obligations. This assurance is one of China's formal commitments. Article XXIV:12 of the GATT 1994, which presupposes a degree of independence on the part of local governments, simply does not apply.²⁷

25. See Working Party Report, *supra* note 6.

26. See *id.* ¶ 70.

27. See, e.g., GATT Secretariat, *Canada—Measures Affecting the Sale of Gold Coins*, L/5863 (Sept. 17, 1985) (unadopted report), available at 1985 WL 291500 (finding that Article XXIV:12 applies to federal, not unitary, states, and "only to those measures taken at the regional or local level which the federal government cannot control because they fall outside its jurisdiction under the constitutional distribution of competence[.]"). A subsequent panel report that was adopted used

Obviously, however, the real question is not quite so simple as the legal question. Subnational governments in China can enjoy considerable *de facto* autonomy from Beijing; this is a fact, not simply a convenient excuse for inaction cooked up by the Chinese central government. China suffers from numerous internal trade barriers that the central government is continually struggling, often unsuccessfully, to remove. We should not be surprised if, even with good intentions, it has at least as much difficulty removing barriers to foreign goods and services.

The phenomenon of local protectionism is one that has attracted the attention and concern of academics and policymakers in China for some time. Internal trade barriers are just one aspect of it; favoritism to local parties in courts is another. But it is important to understand that it is not just foreigners who want to get rid of local protectionism. It is generally in the interest of the central government to expand its sphere of actual authority and to reduce such local protectionism. Practical considerations, more than ideological ones, have stood in the way of progress in this area. Academics and others have proposed for years, for example, that judges in local courts should be appointed and salaried by the central government instead of the local government. So far, however, the central government has not been willing to expend the political and financial resources necessary to put this reform into practice. But pressure for such reform is building. A recent article in *Jingji Yaocan (Economic Reference)*, the internal (non-public) journal of the State Council's think tank on development issues, advocated precisely such a reform.²⁸

The main factor behind local economic protectionism is the dependence of local government upon local enterprises for revenues. To the extent a government collects revenues, whether in the form of taxes or profits from an enterprise, it is similar to an owner and has an interest in protecting those revenues. When the owner of an enterprise can control the conditions under which that enterprise competes, the results are utterly predictable. With the further progress of economic reform in China, one might expect to see a widening of the tax base along with a reduction in the dependence of local governments upon specific enterprises for

virtually identical language in finding that Art. XXIV:12 "was designed to apply only to those measures by regional or local governments or authorities which the central government cannot control because they fall outside its jurisdiction under the constitutional distribution of powers."). See GATT Secretariat, *United States—Measures Affecting Alcoholic and Malt Beverages*, June 19, 1992, GATT B.I.S.D. (39th Supp.) at 206, 296 (1993), available at 1992 WL 799397.

28. See Wang Xu, *Tuijin Sifa Tizhi Gaige, Ezhi Sifaquan Difanghua Qingxiang [Push Forward Reform of the Judicial System, Block the Trend Toward Localization of Judicial Power]*, JINGJI YAOCAN [ECONOMIC REFERENCE], Nov. 31, 2001, at 11.

revenues. Needless to say, however, the influence of powerful local businesses seeking protection will not disappear in China any more than it has disappeared in China's trading partners.

The second issue is that of the capacity of China's courts to handle a substantial workload of reasonably complex cases. Here the news is neither especially good nor especially news, since it has been widely known for some time that China's courts are weak and its judges, on the whole, poorly qualified. China's courts will continue to present difficulties in the years ahead.²⁹ On the other hand, as in many other areas of Chinese legal and political life, reform is most likely where there is a solid domestic constituency for it, and court reform is undoubtedly one of those areas. The key issues in court reform, from the standpoint of China's fellow WTO members, are the qualifications of judges, the willingness and capacity of courts to render fair judgments free of corruption and pressure from local government, and the ability of courts to execute those judgments once rendered.

The low qualifications of China's judges are no secret and indeed are a regular subject of discussion by high government officials, including the President of the Supreme People's Court.³⁰ As of 1995, for example, only five percent of China's judges nationwide had a four-year college degree in any subject (let alone in law)³¹ and it is currently estimated that about ten percent of judges have a four-year college degree in law.³² A 1998 study of nine basic-level courts (the lowest level) in a major provincial city revealed that only three percent of the judges had a bachelor's degree in law.³³ The "great majority" had held other types of jobs in the court administration such as bailiff, clerk, or driver before being promoted to the rank of judge.³⁴

The frequency with which situations such as this are reported suggests strongly that there is no political difficulty with advocating reform and that

29. On courts in general, see generally Donald C. Clarke, *Power and Politics in the Chinese Court System: The Enforcement of Civil Judgments*, 10 COLUM. J. ASIAN L. 1 (1996) and Susan Finder, *Court System*, in DOING BUSINESS IN CHINA ch. 2.1 (Freshfields ed., 2001).

30. See Xu Lai, *supra* note 15, at 1 (reporting remarks of Supreme People's Court President). Two other senior Supreme People's Court officials make similar comments in *Li Interview, supra* note 24, at 55 and Cao Shouye, *supra* note 14. However accurate the comments, one must wonder about morale among lower court officials constantly held up for contempt by their superiors.

31. See Deng Ke, *Sifa Gaige: Xianshi yu Keneng* [Judicial Reform: Reality and Possibilities], NANFANG ZHOUMO [SOUTHERN WEEKEND], Internet edition, Oct. 25, 2001.

32. Author's interview with members of Beijing University Faculty of Law (Mar. 2001).

33. See Li Xiaobin, *Shenpan Xiaolü Ruhe Neng You Da Fudu Tigao?* [How Can There Be a Large Increase in the Efficiency of Adjudication?], FAXUE [JURISPRUDENCE], no. 10, at 52 (1998).

34. *Id.*

such advocacy is supported in important sectors of the central government. China has in fact recently taken solid steps toward improving the qualifications of judges. In March of 2002, for example, China held the first administration of a new unified judicial examination for lawyers, prosecutors, and judges. Although sitting judges will not be required to take or pass the examination, to require this of judges going forward is already a surprisingly far-reaching reform at this stage of China's legal development. Indeed, one wonders whether the pool of those who pass and are willing to serve as judges will be big enough to serve the needs of the court system. In any case, however, this reform—and the political difficulties that must have been overcome to effect it—is solid evidence of the potential for significant reform to occur where there is a domestic constituency for it. Fortunately, there *is* a domestic constituency for significant further reforms in the judicial system.

In addition to the problem of the quality of judges, China's courts are at present not fully reliable as enforcers of statutorily guaranteed rights. This is true for a number of reasons. First, while statutes are superior to regulations issued by government ministries in China's formal constitutional structure, both government officials and court officials will generally consider a ministry regulation that is directly on point to be the applicable rule. This is simply a matter of what might be called customary legal culture; it has been both noted and criticized in China as well as abroad³⁵ and many critics viewed WTO accession as a helpful spur to change. Nevertheless, change will not come quickly. Second, there is the well known problem of corruption in the judiciary. This problem is not of course unique to China. Third, Chinese courts often have difficulty enforcing their judgments.³⁶

Fourth, and less well known, is the tendency of Chinese courts not to aggressively seek jurisdiction over cases, but on the contrary to fear it and often to go to great lengths to avoid taking difficult or sensitive cases. Courts in China have the choice of accepting or declining a case. This power is somewhat akin to the institution of summary judgment in its gatekeeping function, but quite unlike it in that it is not governed by any consistent set of principles other than the court's general sense of whether the case seems meritorious and deserving of further proceedings. Courts

35. See, e.g., Clarke, *supra* note 16, at 9, 12.

36. As this problem is also well known and has been the subject of considerable commentary elsewhere, I do not discuss it further here. See Randall Peerenboom, *Seek Truth from Facts: An Empirical Study of the Enforcement of Arbitral Awards in the People's Republic of China*, 49 AM. J. COMP. L. 249 (2001); Clarke, *supra* note 29.

can use this power simply to decline to hear, and thus avoid ruling on the merits of, cases that look troublesome and likely to offend powerful interests no matter how the court decides.

Most recently, the Supreme People's Court of China stirred up a major controversy when it instructed lower courts simply to stop accepting shareholder suits for damages based on certain violations of China's Securities Law.³⁷ This instruction, it is important to note, was not based upon a theory that the shareholders had no legal right of action under the Securities Law. It was explicitly based on the grounds that adequate procedures had not yet been worked out for hearing such suits, and that they would therefore have to wait.³⁸ The real reason was simply that the courts were terrified of a number of lawsuits that shareholders were bringing, or about to bring, in several courts around the country. The specter of overloaded judicial resources and inconsistent decisions on similar facts was too much to contemplate.

Several months later, the Supreme People's Court finally announced that investors would be allowed to proceed with actions based on claims of false disclosures in securities trading, but only where China's Securities Regulatory Commission (CSRC) had established the existence of such false disclosures.³⁹ While this is no doubt welcome news to investors, it underscores the casual attitude taken by government agencies and courts toward statutorily granted rights. The Court apparently agrees with the plaintiffs that they have a valid claim under the Securities Law, but has interposed, without any statutory foundation whatsoever, the CSRC as a gatekeeper in order to ensure that claims not approved by the government

37. Zuigao Renmin Fayuan Guanyu She Zhengquan Minshi Peichang Anjian Zan Bu Shouli de Tongzhi [Notice of the Supreme People's Court on Temporarily Not Accepting Securities Cases Involving Civil Suits for Damages] (Sept. 21, 2001).

38. See Gao Yuan Biaoshi Shenli Zhengquan Jiufen An Jiang Zhubu Tuikai [*Supreme Court Indicates that the Hearing of Cases Involving Securities Disputes Will Gradually Be Increased*], ZHONGGUO ZHENGQUAN WANG [CHINA SECURITIES NET], Oct. 11, 2001, at <http://www.cnstock.com> (reporting remarks of Supreme People's Court official Cao Shouye).

39. See Zuigao Renmin Fayuan Guanyu Shouli Zhengquan Shichang Yin Xujia Chenshu Yinfa de Minshi Qinquan Jiufen Anjian Youguan Wenti de Tongzhi [Notice of the Supreme People's Court on Issues Related to the Acceptance of Civil Tort Dispute Cases Stemming From False Representations in the Securities Markets], Jan. 15, 2002; see also Richard McGregor, *China to Allow Investors to Sue Listed Companies*, FIN. TIMES, Jan. 15, 2002, available at 2002 WL 3303358. In January, 2003, the Supreme People's Court issued another document further detailing the procedures for such suits, and adding punishment by other government agencies or a criminal court as an alternative prerequisite to bringing suit. See Zuigao Renmin Fayuan Guanyu Shenli Zhengquan Shichang Yin Xujia Chenshu Yinfa de Minshi Peichang Anjian de Ruogan Guiding [Several Rules of the Supreme People's Court on Civil Compensation Cases Stemming From False Representations in the Securities Markets], Jan. 9, 2003, effective Feb. 1, 2003.

will not come before the courts. All other claims remain barred for at least the time being.

WHAT KIND OF LEGAL SYSTEM DOES THE WTO REQUIRE?

Despite the problems discussed above, it must be recalled that the WTO does not mandate a perfect legal system, or even a basically fair one, outside of a few specific areas. At times, according to some of the more ambitious claims, it seems that China must utterly revamp its legal and political system—in short, stop being China—or risk being found in violation of its WTO commitments. One analyst goes so far as to state that the national treatment and transparency requirements of the GATT require China to amend its constitution to eliminate any special position for the Communist Party and to delete or amend the word “socialism” to the extent that it implies or authorizes Party control over the operation of the legal system.⁴⁰

This is going too far. First, the requirements of the WTO agreements for fairness and transparency are in fact surprisingly limited. The only WTO agreement that comes close to a general requirement of fairness in the operation of the legal system is the TRIPS Agreement. This agreement does indeed set forth a number of requirements for fair judicial proceedings for the protection of intellectual property rights.⁴¹ However, it is worth noting that Article 41.5 specifically states:

this Part [III] 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. Nothing in the Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.⁴²

Once this disclaimer of obligation is taken into account, there is not much left of the Part III obligations beyond the duty to pass appropriate legislation. It is hard to see a strong mandate here for institutional reforms.

40. See Pitman Potter, *The Legal Implications of China's Accession to the WTO*, CHINA Q., no. 167, at 592, 603 (2001).

41. See generally General Agreement on Tariffs and Trade—Multilateral Trade Negotiations (The Uruguay Round): Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods, Part III, arts. 41-50, Enforcement of Intellectual Property Rights, 33 I.L.M. 81 (1994) [hereinafter TRIPS Agreement].

42. TRIPS Agreement, *supra* note 41, art. 41.5.

Finally, of course, the TRIPS Agreement's obligations apply only to proceedings for the protection of intellectual property rights. These are a small part of the legal system's activity. Indeed, the very fact that the requirements of Part III are specifically listed in the TRIPS Agreement suggests that those requirements do not apply to the other WTO agreements and do not attach to WTO membership generally; they could almost be read as a list of features a country's judicial system does *not* need to have outside the realm of intellectual property.

Other WTO agreements such as the GATT and the General Agreement on Trade in Services (GATS) also have provisions spelling out transparency requirements, but once again the obligation is more limited than generally assumed. Article X of the GATT contains requirements respecting transparency and the impartial administration of law, but these apply only to a limited subset of China's laws: those affecting trade in goods. Similarly, the corresponding provision of the GATS applies only to scheduled sectors—those that China has agreed to open up at least partially.

In short, there is no general obligation under the WTO agreements to have a fair and well functioning legal system. That obligation applies only to specific actions in specific sectors. Of course, it is unlikely that a state could produce a fair and well functioning legal system in those sectors and be unable or unwilling to produce it in others. Nevertheless, it is important to bear in mind that the undoubted problems of China's legal system cannot uniformly be condemned as violations of its WTO commitments. Many WTO members have or used to have legal systems of questionable fairness, yet nobody has ever suggested they were therefore disqualified from WTO membership. The fact that China happens to be a major actor in the world trading system, whereas these members may not have been, does not change the argument.

A second answer to the claims that accession requires major revisions to China's entire legal system is to note that the WTO system cares much less about what you say than about what you do. The constitutions of the WTO member states contain any number of vague provisions susceptible of various interpretations, many of which might be WTO-unfriendly. But the issue for China's trading partners is not whether its constitution gives primacy to the Communist Party in judicial proceedings. It is not even whether the Communist Party in practice controls judicial proceedings. It is whether those proceedings, *as actually conducted*, meet the GATT, GATS, and TRIPS Agreement tests of fairness and transparency.

The area of the Chinese legal system that will probably cause the most difficulty is its present inability to provide, at least on a consistent basis,

truly independent review of administrative actions. The financial dependence of courts on local government is compounded first by the lower political status of judges relative to many of the officials whose actions they will be called upon to judge, and second simply by the tradition of judicial deference to administration. This tradition is reinforced in a very concrete way by the structure of courts, which are at every level part of the so-called "political-legal" system at the same level of the administrative hierarchy. This system is a vehicle of Party control that coordinates the activities of courts, police, and prosecutors. Parties may be justly dubious of receiving an impartial hearing in an environment where *ex parte* contacts are common, corruption is widespread, and courts are allowed and even encouraged to contact superior courts (without notice to the parties) for their advice on specific cases before rendering a judgment.

Future reform is not, of course, out of the question. Many of the problems were diagnosed in China long ago and the solutions to at least some of them are already on the table: among them, for example, putting power over staffing and financing of courts to the central government, raising judicial salaries in order to attract better-trained personnel, and ending the use of courts as a dumping ground for demobilized army officers.

Bearing in mind the problems outlined above, I shall now turn to a few specific commitments relating to China's legal system where I see potential difficulties in compliance. Three relate to transparency. In Paragraph 334 of the Working Party Report, China promised to make available, not less than ninety days following implementation, all laws, regulations, and other measures pertaining to or affecting trade in goods or services, TRIPS, or foreign exchange control in one or more of the official WTO languages. Considering the vast array of potential sources of relevant measures, including central ministries, local governments, and people's congresses, and even the court system, this is an astonishingly ambitious commitment. It is worth noting that despite the great thirst in the private sector for such translations, not a single service, commercial or otherwise, exists today that can truly say that it provides translations of *all* such laws and regulations. The universe is simply too vast.

China has undertaken a similarly vast commitment in Paragraph 336 of the Working Party Report. It has promised to designate one or more enquiry points where information about all laws, regulations, and other measures pertaining to or affecting trade in goods or services, TRIPS, or

foreign exchange control, as well as texts, can be obtained.⁴³ To fulfill this promise completely, the enquiry point will have to be fully informed as to all relevant provincial and local regulations from all parts of China. One wonders whether any country could carry this out successfully.

Finally, in Paragraph I.2.C.3 of the Accession Protocol, China has promised that any individual, enterprise, or WTO member can request information about any measure required to be published under the Accession Protocol at a designated enquiry point, and that a response will be forthcoming within thirty or at most forty-five days. Although China has promised an “authoritative” reply only to fellow WTO members, it has nevertheless promised an “accurate and reliable” reply to individuals and enterprises. Even this standard could prove difficult to meet if the enquiry point is flooded with questions. In short, these three provisions all seem to promise to make available a kind of knowledge that does not currently exist, and which it will be very burdensome to provide.

Similar problems are likely to afflict the Transitional Review Mechanism, which on China’s part consists primarily of the obligation to supply information. Given the vast range of information called for, it seems inevitable that China will interpret the requirements for information disclosure narrowly. While procuring the statistical information called for is merely a question of requiring the relevant authorities to collect the data, it will be more difficult to provide the promised complete lists of relevant regulations and administrative measures. It will not always be obvious that a particular regulation may have an impact on trade in goods or services.

In addition to the specific problems indicated above, the Working Party Report and the Accession Protocol also pose somewhat contradictory demands both at the conceptual level and at the concrete level. They generally promote the strengthening of legal institutions in China, but in some places seem to promote the opposite and instead to encourage China to continue its tradition of administrative omnipotence. More generally, China’s government is paradoxically being asked to exercise central power to further decentralization, and to exercise administrative power to strengthen judicial power.

Consider, for example, Paragraph 68 of the Working Party Report, where China promised to implement its commitments through the timely promulgation of administrative regulations, departmental rules, and other central government measures. If they were not promulgated in time, the

43. See Ministry of Foreign Trade and Economic Cooperation, *supra* note 23, and accompanying text.

government would still honor China's WTO commitments. Presumably China made this promise at the behest of Working Party members, but it is tantamount to saying that the government may decide at any time simply to ignore its own duly promulgated regulations and to operate according to some other set of standards. Fortunately for the rule of law in China, the Chinese government was apparently not asked to promise to ignore "laws," *i.e.*, legal requirements issued by a constitutionally superior body, the National People's Congress or its Standing Committee.

Perhaps more troublesome is the fact that apparently courts, as well as administrative agencies, are to ignore state regulations if they cannot be changed in time. Here, the issue is how courts are to be informed, other than through the normal process of formal repeal and replacement, that duly promulgated State Council regulations they would normally be bound to implement have lost their effectiveness. The only method would seem to be one that China's trading partners are in other arenas encouraging her to move away from: the unofficial note or telephone call from a senior official instructing courts to operate in a way that is both arbitrary and opaque.

Similarly, Paragraph 203 of the Working Party Report contains a promise not to enforce the terms of contracts containing foreign exchange balancing, local content, or export requirements. The demise of such obligations will cause few tears among foreign investors. If the government is saying that as a regulator, it will decline to exercise its discretionary authority to seek sanctions against those who do not fulfill those terms of their joint venture contracts, that is one thing. But if it is claiming the power to order courts not to enforce, between parties, contract rights arising under laws passed by the National People's Congress or its Standing Committee (both constitutionally superior bodies), that is quite another. It may indeed have such power as a matter of practical fact, but whether China's trading partners should be encouraging its exercise is questionable.

PROSPECTS FOR ASSISTANCE IN COMPLIANCE AND CAPACITY-BUILDING

Because of China's relative lack of experience with a market economy, it is inevitable that despite the government's efforts to identify and weed out WTO-inconsistent legislation, some inconsistent rules and practices will remain, and new ones will crop up. It is in fact likely that many such inconsistent rules will be discovered over time. The government has already devoted considerable energy to making Chinese laws and regulations consistent with its WTO obligations. As in any country, there

may be rules the government wishes to retain that its trading partners view as questionable under WTO principles, such as the E.U. rules on bananas or the U.S. rules on Foreign Sales Corporations. There may also be rules that displease China's trading partners that do not in fact run afoul of the WTO agreements. But there is no reason to doubt that the Chinese government is in principle genuinely committed to getting rid of many of the old rules that shackled the economy and has seized WTO accession as an opportune moment to do it. There is no reason to think that the Chinese government is committed to defending every WTO-inconsistent rule to the bitter end.

The United States is now very much involved, both at the governmental and the non-governmental level, in activities aimed at promoting compliance and building capacity.⁴⁴ These activities should continue. Considering the volume of trade at stake, the required expenditure is probably quite modest.

The United States should work with China to develop formal mechanisms—some of which are already in existence—that can identify questionable rules and practices, hear arguments from affected parties, and deliver advice to the appropriate governmental body on the WTO-consistency of the rule. Such mechanisms would give the Chinese government the opportunity to continue, in a structured and unified way, its review of its own regulations, and could serve to obviate the need for formal WTO dispute resolution procedures in many cases.

In particular, compliance and capacity-building efforts should be directed at local governments. The degree of local government commitment to reform and receptivity to WTO standards and principles varies. But almost all local governments have one thing in common: they are drastically less informed than the central government about the WTO in general and about China's specific commitments in particular. Only recently have the WTO accession documents been available in Chinese. Even though they can now be downloaded from MOFTEC's website,⁴⁵ it is no more realistic to expect Chinese local officials to understand their details than to expect American local officials to understand the WTO. There is a great need at the local level for seminars and workshops that will explain the basic principles of non-discrimination and transparency. Local governments should be encouraged to set up their own offices for

44. See Goldstein, *supra* note 22; see also Shaun Donnelly, WTO Compliance and Sectoral Issues, Written Testimony of the U.S. Department of State Before the U.S.-China Security Review Commission (Jan. 18, 2002), at <http://www.uscc.gov/tesdon.htm> (last visited July 3, 2002).

45. See www.moftec.gov.cn.

hearing and resolving complaints about WTO-inconsistent measures so that recourse need not be had to Beijing or, failing that, the WTO Dispute Settlement Body.

It is important, however, to pay some attention to the target audience. It may make a great deal of sense to train judicial officials in the principles of transparency and due process, for example, but they have very little need to be acquainted with China's substantive commitments under the WTO. Those commitments mean little to courts until they have been translated into domestic law. On the other hand, it is probably a good idea to train local government officials in the principles of non-discrimination and national treatment, since the granting of special breaks and favors on an *ad hoc* basis is a deeply rooted government practice as natural and unremarkable as breathing.⁴⁶

CONCLUSION

China is a large country in which the central government has a serious problem in making its writ run in a number of sectors. Moreover, it is just emerging from a period of extensive, and perhaps WTO-inconsistent, government control over economic activity. Even assuming the utmost good faith on the part of the central government, therefore, there are bound to be WTO-inconsistent measures and practices—quite possibly a good number of them—that persist after China's accession. Those who predict problems are not wrong to point this out. What is unlikely, however, is that these problems will amount to more than routine frictions, and will bring either China or the world trading system crashing down, or will require major changes in the way China is governed, such as removal of the Communist Party from its traditional spheres of influence.

First of all, any dispute settlement proceedings that are undertaken will take time. This is insufficiently realized by many Chinese commentators, who are afflicted perhaps by too strong a sense of urgency. It is commonly

46. In the "China" section of its *2002 National Trade Estimate Report on Foreign Trade Barriers*, the Office of the United States Trade Representative reflected concerns that "local officials do not understand China's WTO commitments." U.S. TRADE REP., NAT'L TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 48 (2002). These concerns seem well founded. See, for example, Zhejiang Sheng Taiwan Tongbao Touzi Baozhang Tiaoli [Zhejiang Province Regulations on Protecting the Investment of Taiwanese Compatriots], passed by the Zhejiang Provincial People's Congress Standing Committee on Dec. 28, 2001—just after accession. They promise special benefits for Taiwanese investors, thus apparently violating most-favored-nation principles to the extent that the investment is in a sector covered by, for example, the GATS, and further specifically encourage investment in projects that will produce for export. To the extent that the "encouragement" constitutes an export subsidy, it will of course violate the GATT.

said, for example, that the need to identify and revise inconsistent regulations is pressing because if inconsistencies are found once China is in the WTO, its trading partners can impose trade sanctions. In fact, of course, the process is not nearly so fast. The complaining state must first notify China of its complaint and then engage in discussions. Only when the complaining state declares dissatisfaction with the results may it bring a proceeding under the WTO's dispute settlement procedures. If China ultimately loses the dispute, the Dispute Settlement Understanding allows a reasonable time—generally about fifteen months—within which to modify the offending regulations.

Second, it has become clear even in the very short time since China's accession that its trading partners have no intention of flooding the Dispute Settlement Body with complaints. Individual companies cannot bring complaints in this forum against WTO members; only other member governments may do so. The trade authorities of those member governments have limited resources and must pick and choose the cases they want to bring. Moreover, they are limited by diplomatic considerations. Thus, there is no evidence of a rush on anyone's part to bring large numbers of complaints.⁴⁷

In considering the usefulness of compliance and capacity-building programs, it is important to bear in mind that the main driver of change in the Chinese legal system will be internal developments in China, not foreign legal assistance programs. Thus, effective compliance and capacity-building programs must be designed to work over the long term and to build relationships with specific institutions. They must strike the balance between asking too much and asking too little, either of which will lead to nothing being done. And the U.S. government must be willing to work with and through non-governmental organizations, other WTO members, and multilateral organizations in order first to demonstrate that WTO compliance is not simply a narrow American political interest, and second to avoid having discussions about Chinese compliance with multilateral standards turn into possibly contentious, and certainly fruitless, discussions about U.S. trade practices vis-à-vis China.

47. See, e.g., Reuters, *U.S. Business Says Patient [sic] on China WTO Commitments*, WORLD ENVTL. NEWS, Feb. 8, 2002, at <http://www.planetark.org/avantgo/dailynewsstory.cfm?newsid=14467>.

